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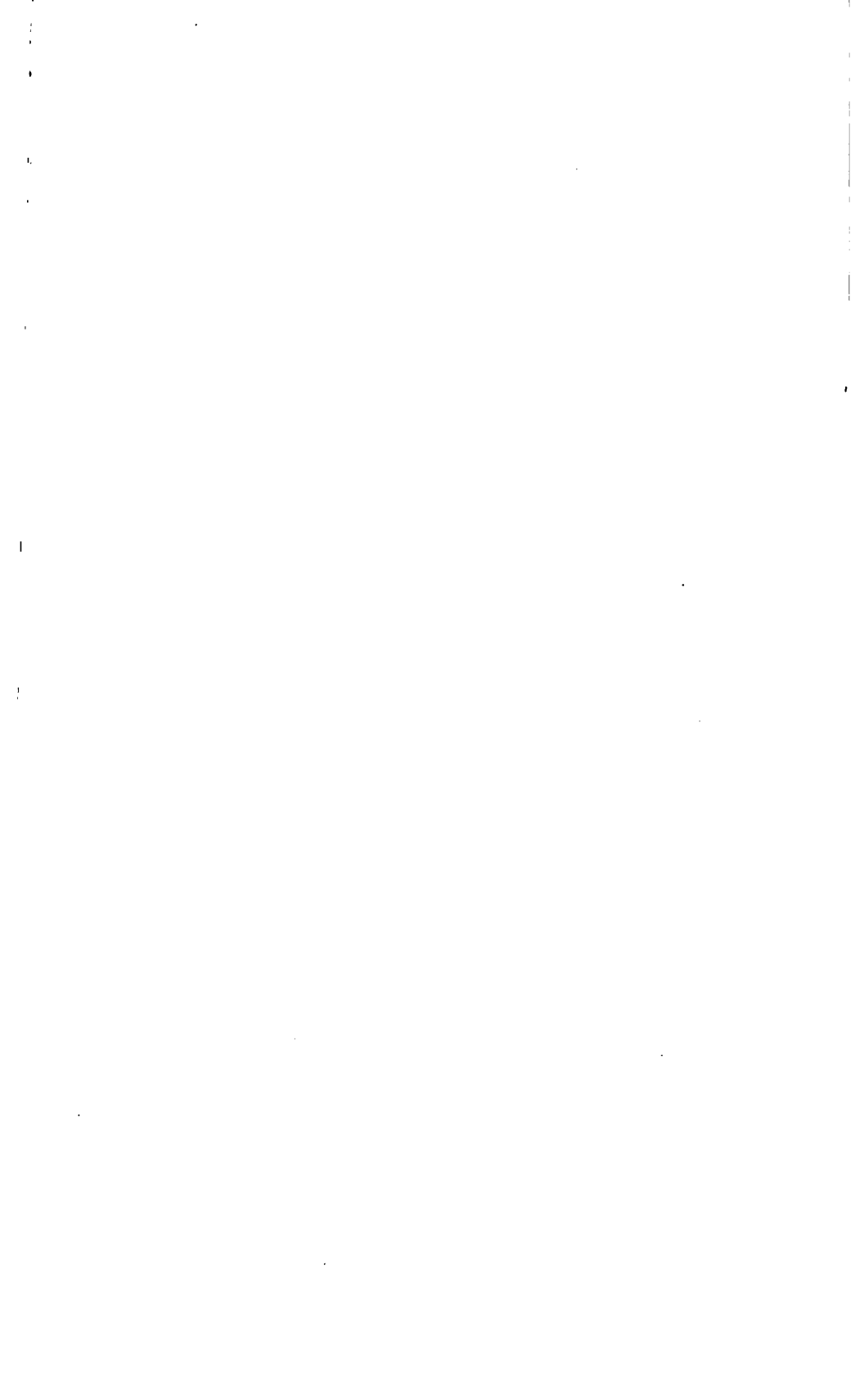
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH;

WITH
TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

*Si quid novisti rectius istis,
Candidus imperti: si non, his utere mecum.*—HOR.

SIXTEEN VOLUMES IN EIGHT.

VOLUME V.

EMBRACING VOLS. IX. AND X. OF FORMER EDITIONS,

AND CONTAINING

**THE CASES OF MICHAELMAS, HILARY, EASTER AND TRINITY TERMS IN THE
FORTY-EIGHTH, AND OF MICHAELMAS AND HILARY TERMS IN THE FORTY-
NINTH YEAR OF GEORGE III....1807-8-9.**

SECOND AMERICAN EDITION,
WITH THE ADDITION OF NOTES AND REFERENCES.

BY G. M. WHARTON.

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JUL 9 1901

JUDGES
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

EDWARD Lord ELLENBOROUGH, Chief Justice.

Sir NASH GROSE, Kn't.

Sir SIMON LE BLANC, Kn't.

Sir JOHN BAYLEY, Kn't.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Kn't.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Kn't.

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CASES

IN

MICHAELMAS TERM,

IN THE FORTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

Wm. Robinson v. Chipchase Grey, Margaret Robinson,
Wm. Grey and T. R. Grey.

9 East, 1. Nov. 6, 1807.

One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and after their decease, in trust for all and every the *child and children* of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any *issue*, then after the decease of the survivor, in trust for her grandson in fee, who was her *heir at law*: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the lifetime of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; held that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates *in fee* as tenants in common.

THE Master of the Rolls sent the following case for the opinion of this court.

Margaret Robinson by her will, dated the 10th of *March* 1762, duly executed and attested, after reciting that she had lately entered into articles of agreement with *J. Rosamond*, and *Henry Wastell*, clerk, for the purchase of several messuages and other premises in *High Street, Sunderland*, in the several occupations of *M. Harrison, Chipchase Grey*, and others named, as tenants thereof; which agreement had not been carried into execution; she thereby desired that her executrix after named should, as soon as conveniently might be after her decease, procure the said agreement to be carried into execution, and raise and pay the purchase-money out of her personal estate: (except the plate, china, household goods, and other furniture in her dwelling-house at the time of her death), or by sale or mortgage of the premises so purchased. The will then proceeded: "And I do hereby give and devise the said messuages and other premises so purchased as aforesaid to Lady *Ann Middleton*, her heirs and assigns, upon the several trusts, and for the uses, intents, and purposes following; viz. in trust, first, to pay the rents and profits of the said premises to my three daughters, *Elizabeth Robinson, Ann*, wife of *Chipchase Grey*, and *Margaret Robinson*, and to the survivor of them, for their respective natural lives, to be equally divided amongst them share and share alike. And I order and direct, that the share of my said daughter, *Ann Grey*, shall be paid into her own proper hands, &c. for

"her separate use, and that her receipt, notwithstanding her coverture, shall be a sufficient discharge for the same. And from and immediately after the decease of all my said daughters, the said premises and the rents and profits thereof shall be in trust for all and every the child and children, as well sons as daughters, of my said three daughters, *Elizabeth, Ann, and Margaret*, who shall be living at the death of the survivor, of my said daughters, share and share alike; to take as tenants in common and not as joint tenants. But if all my said daughters shall happen to die without leaving any issue, then immediately from and after the decease of the survivor of my said daughters, in trust for my grandson, *Wm. Robinson*, his heirs and assigns for ever. And my will is, that the said premises shall be conveyed in pursuance of the said agreement to and for the several uses, intents, and purposes hereinbefore limited, expressed, and declared. Also I give and bequeath to my said daughters, *Elizabeth Robinson, Ann, and Margaret Robinson*, all the plate, china, household goods, and other the furniture, &c. remaining in my dwelling-house at the time of my death, equally to be divided between them, share and share alike. And as to all the *rest and residue* of my real and personal estate, whatsoever and wheresoever, or of what nature or kind soever, I give and devise the same to my said three daughters, their heirs, executors, &c. to be equally divided amongst them, share and share alike: subject nevertheless to the payment of all my just debts, legacies, and funeral expences, which I hereby direct to be paid thereout by my said executrix. Provided nevertheless, that the said several bequests to my daughter *Elizabeth Robinson* are not intended to be any satisfaction to her for a debt of 100*l.* due from me to her, and secured by bond dated the 9th of *March* instant; which I will that she shall receive out of my estate and effects, over and above what is hereinbefore given to her. And I appoint the said Lady *Ann Middleton* sole executrix of this my will," &c.

The testatrix died on the 24th of *March* 1762, leaving the plaintiff, *Wm. Robinson*, her grandson and heir at law, and leaving also her said three daughters, her surviving. Lady *Ann Middleton* declined to act in the trusts of the will, and having renounced the execution thereof, by indentures of lease and release of the 12th and 13th of *February* 1767, made after her death, the said *Henry Wastell* and *John Rosamond* being seised in fee, and one *Wm. Middleton*, heir of the said Lady *Ann*, did, for the consideration therein mentioned, convey the premises in the will mentioned, in pursuance of the said agreement, unto the said *Wm. Robinson*, his heirs and assigns, to the uses following, viz. To the use of one *Adam Boulby*, his executors, &c. for the term of 2000 years, in mortgage, for securing 102*l.* and interest as therein mentioned; and subject thereto, upon the trusts and for the intents and purposes declared concerning the same in the will of the testatrix *Margaret Robinson*. The said mortgage term of 2000 years has by divers mesne assignments become vested in *Chipchase Grey*. After making the said indentures of lease and release, *Ann*, wife of the said *Chipchase Grey*, and daughter of the testatrix, died, leaving two children, viz. the defendants *Wm. Grey* and *T. R. Grey*, her surviving; and *Elizabeth Robinson*, afterwards *E. Scott*, another of the testatrix's daughters, after the making of these indentures, also died, without leaving any issue living at her death; and the defendant, *Margaret Robinson*, is the surviving daughter of the testatrix. *Chipchase Grey* has, by virtue of the said mortgage, and with the consent of *Margaret Robinson, Wm. Grey*, and *T. R. Grey*, been for many years in the possession of the demised premises, and has cut down timber, and otherwise committed waste thereupon; the said *Wm. Robinson* claiming to be entitled under the said will to the remainder in fee of the premises expectant upon the death of *Margaret Robinson, Wm. Grey*, and *T. R. Grey*. In *Michaelmas* term 1803, *Wm. Robinson* exhibited his bill in Chancery against *Chipchase Grey, Margaret Robinson, Wm. Grey*, and *T. R. Grey*, to have his right thereto declared

and established by a decree of the said court, and that *Chipchase Grey* might be restrained from cutting down timber and committing waste on the premises. To which bill the defendants appeared and put in their answer: and on the 19th of March 1805, the cause came on to be heard before the Master of the Rolls, when his Honor ordered that this case should be stated for the opinion of this Court upon the following question: "What estate and interest the testatrix *Margaret Robinson's* three daughters, *Elizabeth Robinson* spinster, *Ann Grey* wife of *Chipchase Grey* and *Margaret Robinson* spinster, and the survivor of them, and their children, or such of them as should be living "at the death of such survivor, respectively took under the said testatrix's will and the said indentures of lease and release?"

This case was argued in *Trinity* term last, by *Abbott* for the plaintiff, and *Holroyd* for the defendants: when it was admitted, that the use was executed in the trustee during the lives of the three daughters, *Elizabeth, Ann, and Margaret*; the trustee being directed to pay the rents and profits into the hands of the daughters and the survivor of them, one of whom also was a married woman; which could not be done, unless the trustee were entitled first to receive and take such profits; which carries the legal estate, according to *Jones v. Lord Say and Sele(a)*, and *Doe v. Simpson*, 5 East, 171. The question therefore turned principally on the estate in remainder which the testatrix's daughters, or their children, might take by implication from the devise over being to the heir at law in a certain event only: assuming it to be clear, that a legal remainder to the issue could not unite with a prior equitable estate for life to the daughters, so as to give them estates of inheritance in the first instance: and that the Court would not execute the use in the trustee beyond what was necessary to give effect to the intention of the testatrix. And though at the time of making the will, the testatrix, having only an equitable, though a devisable(b) interest in the premises contracted to be purchased, could not carve a legal estate out of it: yet the legal conveyance being afterwards made according to the trusts and uses of the will, the question came to be argued as if the terms of the will had been introduced into the deed; the legal estate passing by the deed, and the will operating in effect as a declaration of the uses. However, it was agreed, at the request of the Court, to relieve them from any difficulty in deciding on the devise of a mere equitable title, that the case should be argued as if the testatrix had been seised in fee of the premises.

Abbott, on the part of the plaintiff, argued, that the children of the three daughters who happened to survive all the three daughters (and such only would take any thing) took only estates for life; 1st, considering only the words of devise to the children, without the limitation over to the testatrix's grandson *Wm. Robinson*; 2dly, considering the first devise, with reference to the limitation over. 1st, The devise is of "the said premises, and the rents and profits thereof, in trust for all and every the child and children, as well sons as daughters, of my said three daughters, who shall be living at the death of the survivor of my said daughters, share and share alike, to take as tenants in common and not as joint-tenants." There is nothing in the description of "the said premises and the rents and profits thereof" to shew that any greater estate than for life was intended to be passed. There is not even so strong a word as *hereditament*, which, however, in *Denn v. Mellor(c)*, was held not to be sufficient to carry the fee. Nor are there any words of inheritance or limitation to carry a greater estate than for life. Then,

(a) 8 Vin. Abr. 262, and vi. *Bagshaw v. Spencer*, 1 Ves. 144, and *Harton v. Harton*, 7 Term Rep. 654.

(b) *Langford v. Pitt*, 2 P. Wms. 629, and vide 1 Eq. Cas. Abr. 174, which collects the prior authorities.

(c) 5 Term Rep. 558. 6 Term Rep. 174. 1 Bos. & Pull. 559, and 2 Bos. & Pull. 247.

2dly, the word *issue* in the next clause limiting over the estate to the grandson cannot enlarge the prior devise to the *children of the daughters* to which it refers: but it must be taken to be there used synonymously to children; in which sense it is sometimes used; as in *Goodright v. Dunham*, Dougl. 264, and *Doe v. Perryn*, 3 Term. Rep. 484. [*Le Blanc*, J. observed, that in those cases the limitations were to the children *and their heirs*: and for default of *issue*, then over(a).] But here there are no words of limitation in the prior devise to carry a fee to the children; and the Court cannot supply them by conjecture of what the testatrix might have intended, however hard the case may seem, *Denn v. Bagshaw*, 6 Term Rep. 512. The period contemplated by the testatrix was the death of the last of her daughters; if they left any children, then those children were to take, but for life only, for want of words to carry a greater estate: if there were no such children then living, the grandson was to take in fee.

Holroyd, on the part of the defendants, admitted, that if there had been nothing more in the will than the devise to the children living at the death of the survivor of the three daughters, the children would only have taken estates for life: but he relied on the subsequent limitation over to *Wm. Robinson*, who was the *heir at law* of the testatrix (a circumstance material to be considered) in default of issue of the daughters. And he contended, 1st, either that the three daughters would take estates for lives, as joint-tenants: remainder to their children for lives, as tenants in common; with a vested remainder in fee, or at least in tail, to the three daughters by implication: or, 2dly, that after such life estates, the children as they came *in esse*, would take a vested remainder in fee by implication, liable to be divested as to such of them who died before the three daughters, or the survivor of them: or, 3dly, that the daughters would take a vested remainder in tail, after the life estates to them and their children; with a contingent remainder in fee to the children, as they came *in esse*; which would vest in such as were living at the death of all the daughters; which remainder was liable to be defeated by the particular event of daughters dying, without leaving issue at the death of the survivor; in which event only the estate is given over to *Wm. Robinson, the heir*; who would take either by contingent remainder, if the whole fee were not before disposed of; or by way of executory devise in the particular event, if it were: or, 4thly, supposing that the whole estate was not given over by implication to the daughters, or to their children, by the clause referred to, that the three daughters would take the fee, as tenants in common, under the residuary clause, giving to them and their heirs, equally to be divided amongst them, share and share alike, the residue of the real and personal estate. The devise over to *Wm. Robinson*, the heir at law, was not *generally*, but only in the particular event of there being no issue of the daughters living at the death of the survivor of them; and there was no occasion to devise the fee to him generally, in case none of the children survived the daughters: for the law would have given it to him without the appointment of the testatrix. But it is clear, that in the event of the daughter's leaving children, the testatrix meant that it should not go to her heir at law; and therefore the daughters must take some larger estate than for life; for unless they did, as the children were to take as tenants in common, upon the death of either, the share of that one would go over to the heir at law; but he was not to take in the event of there being any issue left at the death of the survivor of the daughters. By this, the daughters would take a vested remainder in fee, according to the doctrine in *Purefoy v. Rogers*, 2 Saund. 388. a. recognized by Lord C. J. Willes in *Moore v. Heasman*, Willes, 143. So in *Doe v. Clayton*, 8 East, 141, where the testator devised his estate at *Eaton* to his grandson,

(a) Vide *Lewis v. Waters*, 6 East, 336. and *Rix v. The Marquis of Stafford*, 7 East, 521.

without any words of inheritance or limitation; yet this being accompanied with a prohibition to the husband of his daughter and heir at law to "come upon his premises or hereditaments on any account whatsoever;" this was held to give a fee to the grandson by implication. But certainly the daughters would not take less than a vested remainder in tail, according to *Ives v. Legge*(a). The cases of *Goodright v. Dunham*, and *Doe v. Perryn*, do not apply; for there the word *issue* clearly applied to children: but if the children of the daughters had died leaving issue, it could never have been the intention of the testatrix that the limitation over to *Wm. Robinson* should take effect. But if the daughters do not take a fee, their children must, as *the heir at law* is at all events excluded if the daughters die leaving issue. On the 4th point there are authorities to shew, that the whole interest of the devisee not before disposed of may pass by a residuary clause to one to whom an estate for life was before given in the same premises: as *Hogan v. Jackson*, Cowp. 269, and *Ridout v. Pain*(b).

In reply, it was urged, that as the daughters of the testatrix were admitted to take equitable estates for lives in the first instance, they could not take estates tail by the limitation over in default of their *issue*; which being a legal limitation could not coalesce with a prior equitable estate for life. For the trustee takes the first estate; and therefore the limitation over is the same in effect as if made in default of issue of a stranger, to whom no prior devise for life was made; and there is no case to shew that an estate tail can arise by implication from a devise over in default of the issue of a person to whom no life estate is before expressly given by the will. [*Lawrence, J.* Was it not held otherwise in *Walter v. Drew*(c), in the case of an heir at law?] In *Moone v. Heaseman*, the devise over to the heirs of the mother, in case the daughters died before their mother, was to the same person who took the intermediate estate: but here *Wm. Robinson*, though the heir of the testatrix, was not necessarily the heir of his aunts. And in *Doe v. Clayton* the construction arose upon the different provisions of the whole will. Every estate which any person can take on the death of the daughters having children must be contingent, whether the children would take for life or in fee: for none of the children can take but in the event of their surviving the three daughters. At law, the daughters themselves can take nothing: on their death, such of the children as are then living will take for life; or if none be then living, *Wm. Robinson* will take a fee. Then, if the first remainder be contingent, every subsequent remainder must be contingent also; according to *Lodington v. Kime*, 1 Salk. 24.

The following certificate was afterwards sent to his Honour.

This case has been argued before us by counsel: we have considered it, and are of opinion, that, under the will and the indentures of lease and release, the three daughters of the testatrix, *Elizabeth, Anne, and Margaret*, did not take any legal estates; but that *Wm. Robinson*, the releasee in the indentures of lease and release, took, subject to the term of 2000 years, an estate for the lives of the said three daughters, and the life of the survivor of them; and that such of their children as shall be living at the death of the survivor of the said daughters of the testatrix will take estates in fee, as tenants in common, subject to the said term of years(1).

17th June 1807.

ELLENBOROUGH.
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

(a) 3 Term Rep. 488 in note, and 1 Fearn's Cont. Rem. 554.

(b) 3 Atk. 493, and see also *Camfield v. Gilbert*, 3 East, 516.

(c) Com. Rep. 372, and vide *Target v. Grant*, per Parker, C. 10 Mod. 403.

(1) Vide *Doe d. Strong v. Gaff*, 11 East, 668.

Giles and Another v. Perkins and Others, Assignees of Dickinson and Others, Bankrupts.

9 East, 12. Nov. 7, 1807.

A customer paying bills, not due, into his bankers' in the country, whose custom it was to credit their customers for the amount of such bills, if approved, as cash, (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy; and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received.

DICKINSON and Co. were bankers at *Birmingham*, with whom the plaintiffs had opened a banking account in 1804, which was continued down to the 18th of *November* 1805, when *Dickinson* and Co. stopped payment and became bankrupts. On the 12th of *November* 1805, the plaintiffs paid into the bank three bills to the amount of above 1100*l.*, which were indorsed by them, but were not due till *December* and *January* following; and at the time of the bankruptcy, there was a considerable balance due to the plaintiffs upon their cash and bills (due) account, independent of the three bills in question. It was stated to be the practice of this and other banking houses in the country, that when bills which were approved were brought to them by a customer, though the bills were not then due, if they had not a long time to run, they would enter them in a gross sum with cash, or paper which was immediately payable, to the credit of the customer; giving him either cash, or liberty to draw upon them to that amount. And the bankers so far considered these running bills (which were always indorsed by the customer) as their own, that they would, as convenience required, pay them away to other customers in the usual course of business, or transmit them to their own correspondents in *London*: and interest was charged on both sides the account on such paper transactions; and if the interest account turned out to be against the customer, the bankers also charged a certain commission. Differing in this respect from the practice of bankers in *London*, who upon the receipt of undue bills from a customer do not carry the amount directly to his credit, but enter them short, as it is called; that is, note down the receipt of the bills in his account, with the amount, and the times when due, in a previous column of the same page; which sums, when received, are carried forwards into the usual cash column. In the present case, the assignees of the bankrupts considering that the three bills in question had been entered in the bank books in common with cash, and that by the usual mode of dealing the plaintiffs might have drawn for the amount before the bills were due, refused to deliver them up to the plaintiffs on demand; and as they became due the assignees received the money from the acceptors, to the credit of the bankrupts' estate: for which the plaintiffs brought their action for money had and received. And the question was, whether they were entitled to receive back these bills in specie from the bankrupts at the time of their bankruptcy, the same not being then due, though indorsed by them, and the balance of the cash account being in favour of the plaintiffs: or whether they were only entitled to come in as creditors under the commission for the whole amount of their banking account. Lord *Ellenborough*, C. J. was of opinion, at the trial before him at *Guildhall*, that the plaintiffs were entitled to recover; and they accordingly obtained a verdict for the amount of the bills.

Garrow and *Richardson* now moved for a new trial; relying on the course of dealing of country bankers, who always entered approved bills at the usual short dates, as cash, and gave the customers the benefit of drawing upon

them for the amount accordingly. And he referred to *Bent v. Puller*(a), where there having been a general bill account between two parties, one of whom became bankrupt, it was considered that the solvent party in whose favour the balance was, could not maintain trover for the bills deposited by him with the other; they having been paid in on a general account, and not specifically appropriated to answer particular drafts which had not been paid by the bankrupt.

Lord ELLENBOROUGH, C. J. Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker who always takes the bill endorsed, has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be overdrawn; and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs.

Per Curiam,

Rule refused.

Doe, on the Demise of Webb, v. Dixon.

9 East, 15. Nov. 9, 1807.

Under a lease for fourteen or seven years, the lessee only has the option of determining it at the end of the first seven years; every doubtful grant being construed in favour of the grantee.

THE defendant held the premises, for which this ejectment was brought, situated in *Cornwall*, as tenant at rackrent, under a lease, the *habendum* of which was for 14 or 7 years. Notice was given by the landlord to determine the lease at the end of the first seven years; and the question was, whether by this mode or demise an option were reserved to the landlord, as well as to the tenant, of determining the lease at the end of seven years, or whether the tenant alone had such option. At the trial before *Lawrence, J.* at *Bodmin*, there was cited, in support of the lessor's right to bring the ejectment at the end of the seven years, *Goodright v. Richardson*, 3 Term Rep. 462, where it was considered to be the intention of the parties under such a demise, that either might determine it at the end of the first period. And the rule of construction there laid down, it was said, was most consonant to the modern consideration of leases at rack-rent, regarding them as mutual contracts, equally beneficial to both parties, and not merely as grants from the lessors to the lessees; in which view the old rule of construction was applied to them, that every grant should be taken most strongly against the grantor and for the benefit of the grantee. On the other hand, it was observed, that this was not the point in judgment in that case, but an *obiter* opinion only: and that the contrary was decided in the subsequent case of *Dann v. Spurrier*, 3 Bos. & Pull. 399 and 442, which was a case sent by the Lord Chancellor for the opinion of the Court of C. B.; and underwent much consideration; and where it was finally held and certified, that on a lease granted for 7, 14, or 21 years, the lessee alone had the option of determining it at the end of 7 or 14 years; and that went upon the old principle of law in favour of grantees, where the grant

(a) 5 Term Rep. 594, and vide *Buckler v. Bullivant*, 3 East, 72. Sed vide *Parke v. Eliason*, 1 East, 544, and *Finch v. Walker*, 2 Blac. 1154.

was doubtful. The learned Judge held himself bound by this last determination, and nonsuited the plaintiff.

Lens, Serjt. now moved to set aside the nonsuit, and brought these conflicting authorities in review before the Court. But by

Lord ELLENBOROUGH, C. J. All doubts which might at one time have existed on the subject are concluded by the decision in the Court of Common Pleas, which was made upon full consideration of the case in this Court, and the antecedent authorities; and which proceeded upon the application to leases of the general principle, that where the words of a grant are doubtful, they are to be construed in favour of the grantee; and that was certified to the Lord Chancellor, who must be taken to have been satisfied with the decision⁽¹⁾.

Per Curiam

Rule refused.

Doe on the demise of Duckett and Ladbroke, v. Watts.

9 East, 17. Nov. 10, 1807.

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 H. 7. c. 24. it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law: but by the defendant's confession of lease, entry and ouster, the merits only of the lessor's title are put in issue.

AT the trial of this ejectment before *Rooke*, J. at *Warwick*, the lessors of the plaintiff shewed a *prima facie* title. The defendant who claimed under her late husband's will, having confessed lease, entry and ouster, gave in evidence a fine sur cognizance de droit, &c. levied by her husband before his death, as of last *Easter* term, with proclamations, of which one proclamation was made on the 8th of *May* in that term, and another on the 16th of *June* in *Trinity* term; but the plaintiff having served his declaration on the 23d of *May*, one proclamation only had been made before the commencement of the suit. But no actual entry had been made by the lessors to avoid the fine: and the question was, whether such entry were necessary to maintain the action? The learned Judge held, that as the four proclamations had not been made, the fine was not so far complete as to render an entry necessary by one who had title previous to the bringing of the ejectment; and therefore the plaintiff obtained a verdict.

Balguy moved to set aside the verdict on the ground of the Judge's misdirection in law; for that the effect of a fine at common law is to divest all the prior estates, which can only be revested again by entry, or by judgment in a real action^(a). Then the statute 4 H. 7. c. 24., which superadds the proclamations, does not alter the effect of the fine at common law in that respect^(b). Therefore, though the fine in this case could not operate as a fine with proclamations, so as to bar strangers within 5 years: yet still it would have the effect of a fine at common law, and consequently an entry would still be necessary to avoid it and revest the old estate. It is true that in *Jenkins d. Harris v. Prichard*, 2 Wils. 45, it is said, that an actual entry was not necessary to avoid a fine without proclamations: but that was not the principal point in judgment; but only a secondary point, which became unnecessary to be decided, as the Court were clear that the lessors of the plaintiff had no title. And it seems not to have been argued at the bar, or much considered by the Court. It is contrary to principle; and *Flowden* 265., which is referred to in the margin of the Reporter, so far from support-

(1) [See Comyn on Landlord & Tenant, p. 53.—W]

(a) Vide *Flowd.* 357.

(b) *Goodright v. Forrester*, 8 East, 565.

ing the position, rather bears against it: for there it was considered that the stat. 4 H. 7. c. 24, did not alter the form or substance of the fine at common law, but only enabled the party to add proclamations to it for another purpose: and, therefore, though any of the proclamations upon a fine, according to that statute, should be erroneous, as if made on a *Sunday*, it would still operate as a discontinuance at common law.

Lord ELLENBOROUGH, C. J. The stat. 4 H. 7, makes a fine with proclamations a bar, saving the rights of persons who pursue them by *action* or *lawful entry* within a certain time. In *Oates v. Bridon*(a) Lord Mansfield said that the confession of lease, entry, and ouster, was sufficient in all cases, except in the case of a fine *with proclamations*, in which case it was necessary to prove an actual entry. The entry therefore previous to the bringing of an ejectment is only necessary by the words of the statute so far as respects a fine with proclamations; an *ejectment* not being considered as an *action*, within the meaning of it. So is the case of *Jenkins v. Pritchard*, 2 Wils. 45; and the practice ever since has been in conformity with that decision. And when it is said, in several cases, that an entry is necessary before ejectment brought to avoid a fine, it must be understood of a fine with proclamations(b). The point, therefore, having been settled in these cases, there seems to be no ground for disturbing it.

Per Curiam,

Rule refused(c).

(a) Bull. N. P. 103. Vide S. C. 3 Burr. 1897, where Lord Mansfield's expression is more general, that to avoid a fine there must be an actual entry, &c. and that in *all other cases* the confession of lease entry and ouster is sufficient, without adverting to the distinction, as in the note in the Law of Nisi Prius, between a fine, *with proclamations*, and a fine at common law. See also *Goodright v. Cator*, Dougl. 478. and *Smith v. Clyfford*, 1 Term Rep. 741.

(b) *Berrington v. Parkhurst*, Andr. 125, and 2 Stra. 1086, was the case of a fine with proclamations, as appears from the argument. [See a note of this case, taken from Mr. Ford's MS. in 13 East, 489.]

(c) The resolution in this case is contrary to the decision of C. B. in *Tapner d. Peckham and Others v. Merlott and Another*, Wils. 177; which was not referred to upon this occasion, nor noticed in the cases of *Jenkins v. Pritchard*, and *Oates v. Bridon*, though prior to both in point of time. Lord C. J. Willes there said, that the Court would not determine whether the fine there was to be considered as a fine with proclamations, or not; the action having been brought before the time when all the proclamations were expired; and all the proclamations having been made that could be made before that time: because it was clear that it was a fine of one sort or another; and there was no pretence to say that the fine was void. And if not void, all the court were of opinion, that when a person in possession levies a fine of any sort, the parties out of possession cannot maintain an ejectment without an actual entry. Lord Kenyon also, in *Compere v. Hicks*, 7 Term Rep. 732, observed, that in *Berrington v. Parkhurst*, as reported in Andrews, 136, Lord Hardwicke said, that in the case of a fine, the party had no title before entry; *not on account of the stat. of H. 7.*, but on account of the puissance of a fine at common law. On the other hand, the necessity of an entry, before ejectment brought, to avoid a fine seems in other cases, prior to those, to have been put upon the ground of the stat. of H. 7. in relation to a fine with proclamations; as in *Lutterel's case*, Moor, 450.; and in *Audeley's case*, ib. 457, where it is said that the statute is to be construed strictly, being made for the security of titles. Also at common law it was necessary to enter for a condition broken; but in *Little v. Heaton*, 1 Salk. 259, (which was endeavored to be distinguished from the case in *Willes*) an entry was held not to be necessary before the bringing of the ejectment. And the opinion of Lord C. J. Hale was referred to, who in an ejectment tried before him at the assizes in *Bucks* had held that the confession of lease, entry, and ouster, was sufficient; in which opinion all the Judges afterwards concurred with him upon a case reserved. And subsequent resolutions to the same effect were also referred to. It is true that the confession of lease, entry, and ouster, as was observed by Lord C. J. Willes, is, as to the *entry*, a confession of the *entry* of the lessee, and not of the lessor, in ejectment: but it must also be recollected that by the ancient practice, to supersede which the rule for confessing lease, entry, and ouster was made in the time of Lord C. J. Rolle, (Runnington on Ejectment, 14.) leases to try title in ejectment were actually sealed and delivered on the land itself; and consequently the lessor must have entered upon it before, in assertion of his title: because, say the books, it was maintenance in any one who was out of possession to convey to another. And indeed where the rightful owner was dissuaded there might be some risk of his failing in his ejectment, if he had mero-

Donovan, Assignee of Kennett, an Insolvent Debtor, v. Duff, Assignee of the same Kennett under a commission of Bankrupt.

9 East, 21: Nov. 17, 1807.

Neither the bankrupt, nor any person claiming from him by assignment subsequent to the commission of bankrupt, shall be permitted in an action at law, to question the validity of such commission, and recover from assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn, that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out.

THIS was an action for money had and received by the defendant to the plaintiff's use, the proceeds of property belonging to the bankrupt which had been disposed of by his assignee under the commission. The bankrupt had no certificate. The plaintiff became a creditor of his after the commission sued out, and subsequently took an assignment of his effects under the last insolvent debtors' act: and after the bankrupt had made application to the Great Seal to supersede the commission, (on which an issue was directed to try the validity of it, but on which no further proceeding was had;) the plaintiff now brought this action: and in answer to the defendant's proof of a petitioning creditor's debt, an act of bankruptcy, and the commission regularly sued out thereupon under which he was chosen assignee, the plaintiff called the bankrupt to prove an act of bankruptcy prior to the petitioning creditor's debt; in order to invalidate the commission; and also offered proof of a good petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a new commission might be sued out. But Lord *Ellenborough* was of opinion, at the trial at the last sittings at *Westminster*, that it was not competent for the bankrupt himself, or any person standing in his situation, like the plaintiff, to controvert the claim of his assignees under a commission regularly sued out, by shewing a prior act of bankruptcy; however such a defence might be set up by a debtor of the bankrupt resisting a claim made by

ly entered and afterwards executed a lease off the land; for the disseisin continuing in, or immediately after regaining, possession, would have operated as a new disseisin, and consequently as a re-disseisin, of the lessor at the time of executing the lease. Then there is nothing in the stat. 18 Ed. 1. st. 4. *de modo levandi fines*, which requires that an entry shall be made on the land in order to avoid the fine; though it concluded those who had right if they made not their claim of their action within a year and a day *sur la pie*; that is, upon the foot of the fine; and not by the country, as it is translated in *Runninton's* edition of the Statutes, and other books; as if it had been written *pays* instead of *pie*. Vide 2 Black. Rep. 994. But Lord *Coke* seems to consider the stat. of Ed. 1. as repealed by that of H. 7. so far as to render an entry of the party's claim at the foot of the fine unavailable at this day. Certainly it must be unavailable against a fine levied with proclamations according to the latter statute. And since the stat. 21 Jac. 1. c. 16. the party having a right of entry has 20 years within which to make his entry after his right accrues: but by stat. 4 Ann. c. 16. s. 16. no claim or entry on lands shall be of any force or effect to avoid any fine levied with proclamations, or shall be a sufficient entry or claim within the statute of James I. unless an action shall be thereupon commenced within one year after, &c. and prosecuted with effect. Upon the whole it seems now that for every purpose, except that of avoiding a fine with proclamations, in which case the stat. of H. 7. requires an entry, the bringing of an ejectment will serve the same purpose; and indeed, if the good sense of the thing is to be regarded, it seems better adapted to answer any useful purpose for which an actual entry on the land was originally required, or can at this day be made. But if the confession of the lease made by the lessor in ejectment be evidence of an admission on the part of the defendant, that the lessor had made an actual entry on the land before or at the time of making the lease, in order to enable him lawfully to make it; it should seem, while the matter was *res integra*, that the same evidence might have been applied to a fine levied with proclamations under the statute of H. 7. without doing violence to the words of that statute.

the assignees under the commission against him ; as it opened a great door to fraud ; and there was another and more proper method pointed out by the statutes for the bankrupt to obtain redress, by application to the Great Seal to supersede a commission improperly issued against him. The defendant therefore obtained a verdict.

Marryatt now moved for a new trial, and referred to the class of cases where commissions of bankrupt have been considered to be nugatory, on trials at nisi prius, upon proof of a prior act of bankruptcy, and a sufficient petitioning creditor's debt at the time whereon to support a commission. *Doe v. Boulcot*, 2 Esp. N. P. Cas. 595, *Toms v. Mytton*, 2 Stra. 744, and *Bingley v. Madison*, B. R. Mich. 1763, Co. Bankt. Laws, ch. 2. And if a debtor of the bankrupt may object to the claim of the assignee suing for the property of the bankrupt, on account of proving an act of bankruptcy prior to the petitioning creditor's debt, there seems no reason for precluding the bankrupt himself, or any person claiming from him subsequent to the commission, from availing himself of the same objection. The objection goes to the validity of any debt contracted after an act of bankruptcy, as proveable under a commission founded upon such act of bankruptcy : and this is supported by several acts passed to make debts of a certain description so proveable : as the stat. 7 G. 1. c. 31, making bills, &c. payable at a future day proveable under a commission sued out on a prior act of bankruptcy : the st. 6 G. 2. c. 30. s. 22, enabling such bills, &c. to be a sufficient petitioning creditor's debt, and lastly the stat. 46 G. 3. c. 135., which enables *bona fide* creditors, without notice, to prove their debts under any commission of bankrupt, notwithstanding any prior secret act of bankruptcy. [Lord *Ellenborough*, C. J. The existing commission can only be cut down by shewing that another better commission may be taken out ; and that can only be done by shewing not only an act of bankruptcy antecedent to the present petitioning creditor's debt, but also a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy.] That was shewn. [Lord *Ellenborough*, C. J. Still, the only effect of that was to shew that *some other person*, as assignee under a commission to be sued out upon such prior act of bankruptcy, would have a better title than the defendant : but it does not prove that *the plaintiff* has a better right.] In the mean time, and until another valid commission was sued out, the right to the property would be in the plaintiff by assignment from the bankrupt.

LORD ELLENBOROUGH, C. J. That brings it to the original question again, whether *Kennett* himself could have maintained this action against his assignee under the commission of bankrupt, by evidence that he had committed a prior act of bankruptcy ; for his assignee subsequent to the commission cannot be in a better situation than himself. I know of no instance where such proof has been admitted on the part of the bankrupt, and for his benefit, against the assignees under the commission : but I know that in a case before Lord *Loughborough*, when Chief Justice of the Common Pleas, he refused to permit a bankrupt, in an action against his own assignees under the commission, to prove a prior act of bankruptcy, in order to defeat the title of the assignees : and indeed, it would be pregnant with enormous mischief to suffer it. If the bankrupt be aggrieved by the commission sued out against him, he may apply to the Great Seal for relief, which the statutes have authorized the Lord Chancellor to administer. But here we have it admitted, that such an application has been made ; and not succeeding there, it is now attempted to question the commission in this collateral objectionable shape, after the bankrupt himself has acquiesced in it, and after an ineffectual attempt to impeach it directly before the proper tribunal.

LAWRENCE, J. If this were permitted to be done it would place every assignee of a bankrupt in a dreadful situation. For then, after a commission had been sued out upon a clear act of bankruptcy proved, to which the bankrupt submitted, without question, at the time : and after his property had

been collected and distributed under that commission; it would be in the power of the bankrupt, if it were competent to him to adduce such evidence, by bringing an action for money had and received against his assignees, and proving a secret act of bankruptcy prior to the petitioning creditor's debt, to recover from his assignees the whole amount of his property after distribution(1).

The other Judges concurred in refusing the Rule(2).

(1) By the 56th section of the late bankrupt act of the *United States*, it was provided. "That in all cases where the assignees shall prosecute any debtor of the bankrupt, for any debt, duty or demand, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate shall be *conclusive evidence* of the issuing of the commission, and of the person named therein being a trader and bankrupt, at the time mentioned therein." The 52d section provides, that in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the Judge or commissioners, relative to any material fact in the commencement or progress of the proceedings, or in the allowance of the certificate, it shall be lawful for either party to petition the district Judge, and have a trial by jury on the facts set forth; and the judgment entered on their verdict shall be final on such facts. Under these provisions it has been decided by the Supreme Court of *Connecticut*, that the validity of the commission cannot be impeached by any person in an action at law. *Barslow v. Adams*, 2 Day 70. *Bissell v. Post*, 4 Day 79. And in a recent case before the Supreme Court of *Massachusetts* it was held, that the judgment of the district Judge upon a verdict of the jury that an act of bankruptcy had been committed, was conclusive evidence between the assignees and a party claiming under the bankrupt after such act, that the commission was duly issued. *Livermore v. Swasey*, 7 Mass. Rep. 213. But the Supreme Court of *Pennsylvania* have allowed persons claiming under the bankrupt, adversely to the assignment, to contest at law the commission, trading, bankruptcy, and the time of the act of bankruptcy committed. *Rugan & al. v. West*, 1 Binn. 263. This practice seems also to be sanctioned by the opinion of Judge *Washington*. *Barnes & al. v. Billington & al.* 4 Day 81, *in notis*. And it has been decided both in *Massachusetts* and in *Pennsylvania*, that the provisions of the 56th section are not applicable to an action of trover by the assignees. *Lovett v. Culler*, 1 Mass. Rep. 67. *Rugan & al. v. West*, *ubi supra*. For other decisions upon the late bankrupt law of the *United States*, see *Payson v. Payson*, 1 Mass. Rep. 283. *Waterman v. Robinson*, 5 Mass. Rep. 303. *Summons v. Fairfield*, Id. 248. *McMechin's Lease v. Grundy & al.* 1 Hall's Amer. Law. Journ. 203.

(2) [The late Bankrupt Law of U. S. of August 19, 1841, contained, among others, these provisions.

"Sec. 4. And such discharge and certificate, when duly granted, shall, in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are proveable under this act; and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, or prior reasonable notice specifying in writing such fraud or concealment."

"Sec. 8. That the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferrable to, or vested in such assignee."

In regard to Bankruptcy in foreign countries, the Supreme Court of *Pennsylvania* decided, in *Merrick's estate*, 5 W. & S. p. 9, among other points, as follows: "The validity of the petitioning creditor's debt on which a commission of bankruptcy issued in England, cannot be disputed here by the bankrupt, on the ground that the petitioning creditor was an alien enemy, in a case where the debt was settled without taking that objection, and the bankrupt afterwards failed in an action of trespass brought in England against the commissioners, and the Chancellor, on application of the bankrupt, refused to supersede the commission, and a great lapse of time afterwards occurred."—W.]

The King v. Sweet.

9 East, 25. Nov. 11, 1807.

In an order of filiation and maintenance, the justices have no power by the stat. 18 Eliz. c. 3, to direct the defendant to pay the costs of the parish in obtaining the order: but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it.

AN order of filiation, made at the quarter sessions for the county of *Surry*, stated, that

"Whereas it appears to this Court, as well on the complaint of the churchwardens and overseers of the poor of the parish of *Saint Mary, Newington*, in the county of *Surry*, as on the oath of *Elizabeth Kenrick*, single woman, that she the said *E. K.* on 13th May 1805, was delivered of a male bastard child in the said parish of *Newington*, and that the said child is now chargeable to the said parish and likely so to continue: and further, that one *Joseph Sweet* did beget the said child, &c. And whereas the said *J. S.* hath been duly summoned to be and appear before this Court, and hath been now heard, &c. but no sufficient cause hath been shewn why he should not be adjudged the reputed father of the said child: now (upon hearing counsel on both sides, examination of witnesses upon oath, and the premises fully considered,) it is adjudged by this Court, that the said *J. Sweet* is the reputed father of the said child: and it is ordered, as well for the better relief of the said parish of *Newington* as for the sustentation of the said child, that the said *J. S.* shall and do forthwith upon notice of this order pay or cause to be paid to the churchwardens, &c. of *Newington*, &c. 11l. 6s. 6d. for and towards the lying in of the said *Elizabeth Kenrick*, and the maintenance of the said child to the time of making this order; and the further sum of 12l. for the costs of the said parish in and about the obtaining this order. And it is further ordered, that the said *J. S.* shall likewise pay to the churchwardens, &c. of *Newington*, &c. 3s. 6d. weekly, &c. during so long time as the said child shall be chargeable to the said parish of *Newington*."

Two objections were made to this order; 1st, that there was no sufficient adjudication of the birth of the bastard child in the parish of *Newington*, but only a recital of that fact. 2dly, That the sessions had no jurisdiction to award the payment of costs.

Garrow shewed cause in support of the order. As to the first objection; it is sufficient that the fact of the bastard's birth in the parish is recited by the justices as appearing to them upon the complaint of the parish officers and upon oath; and unless that were proved, the justices could not have made the order on the defendant as the putative father. *Rex v. Gravesend*, E. 15 G. 2 MS. 1 Const's Bott, 437, pl. 596, and *Rex v. Moravia*, lb. pl. 596, are in point. And the same construction was made in *Rex v. Fox*, Tr. 29 & 30 G. 2; cited by Lord *Kenyon* from his own MS. in *Rex v. Price*, 6 Term Rep. 148, both of which orders were in the same form, in this respect, as the present. The case of *The King v. Moravia* furnishes an answer to the second objection also; for there a sum in gross adjudged to be paid "for the maintenance of the child and other incident charges and expences" was held well: and as the costs which the parish are put to in securing the reputed father and obtaining the order against him would fall under that general description, there can be no objection in stating the charge for costs in the order. The case of *The King v. Skinn*, E. 15 G. 2 MS. 1 Const's Bott, 421. pl. 552, may be cited as an authority the other way; but that only goes the length of shewing that the Sessions cannot delegate to the clerk of the peace the power of taxing the amount of the costs awarded by them. And *Rex v. Nelson*, 1 Ventr. 37, is

an express authority that the Court have a power of awarding cost upon an order of filiation; supported as the report is by the original order for costs made in that case(a).

Lawes, in support of the first objection, referred to *Rez v. Cuddington*, E. 9 Ann. 1 Const's Bott, 434. pl. 683, as in point, that the order should state that the bastard was born in the parish to which the relief was ordered; which was not cited in *Rez v. Gravesend*, and *Rez v. Moravia*. [The Court observed, that it did not appear in that case what the form of the order was: the fact might no where have appeared in the order.] In *Rez v. Butcher*, 1 Stra. 437, where the order ran; "We A. and B., two justices, &c. residing within the limits where the parish church is, *within which parish the child was born*, do," &c.; it was held not to be a sufficient averment that the child was born in the parish to which the relief was ordered. [*Per Curiam*. The objection there was of another sort, viz. that it did not appear that the parish ordered to be relieved was the same parish where the child was born.] Secondly, the Sessions have no jurisdiction to award costs in any case except by statute; and none of the statutes(b) touching bastards give the justices such a power. In *Rez v. Moravia*, the objection was to the generality of the charges and expences as incident, not to the obtaining the order of filiation, but to the *maintenance of the child*, of which the costs of obtaining the order could form no part: and even that did not pass without great doubt. And the order for costs referred to in *The King v. Nelson* was an order of *this Court*, and not of the Sessions; which was probably made upon the particular circumstances of the case attending the removing of the orders by certiorari; and rests altogether upon the general discretionary power of the Court in all cases where an improper use is made of their process. And the case of *The King v. Skinn* is an authority, as far as it goes, to shew that the Sessions have no power to award costs. [*Grose, J.* stated, that he felt a difficulty upon the words of the stat. 18 Eliz. c. 3. s. 2, which directs the justices to "take order" as well for the punishment of the mother and reputed father of such bastard child, as also for the *better relief* of every such *parish* in part or in all." And unless the magistrates below had a power of directing the costs of obtaining the order to be paid, so far from the parish being relieved, it might in some cases be burthened still more than before.] The same might be said in the case of other orders made by justices of the peace; but except in certain cases where a power to award costs is expressly given, it never was considered that such a power was incident to the power of making the order for the relief of the parties aggrieved. There is no common law jurisdiction even in this Court to give costs upon process: but it is given by different statutes.

LE BLANC, J. observed, that at any rate Mr. *Lawes* could only pray that so much of the order as directed the payment of the 12l. for costs should be

(a) Die Veneris prox. post, 15, Sancta Trinitatis, anno 21 Car. 2di Regis.
 NORTHUSH, } Ordinatum est quod defendens inveniat securitatem pro mantenentia
 Rex } spuriū ipsum nuper geniti super corpus *Elizabetha Barrett*; et simil-
 v. } iter pro indemnificatione parochianorum de *Orten* in comitatu predicto ab
 BENJ. NELSON. } eodem spurio. Et quod idem defendens solvit omnia custagia et expensa
 que iidem parochiani expenderant in et circa mantenentiam predicti spurii, et predictam
Elizabetha Barrett, tempore incubationis ejusdem *Elizabetha*. Necnon quod idem defen-
 dens solvit predictis parochianis omnia custagia et expensa que iidem parochiani expenderant
 in et circa defensionem et prosecutionem ordinis per justicios pacis comitatus predicti facti
 versus defendentem pro mantenentia predicti spurii a tempore quo ordo illa sic facta fuit.
 Et quod *Thomas Fanshawe Miles* interim attendatur cum comptis custagiorum et expensarum
 predictorum parochianorum sic (ut prefertur) expositorum, et quod idem *Thomas Fanshawe*
 certificabit curia hic superinde.

Ex motione Mr. Lovell,

Per Cur.

(b) 18 Eliz. c. 2. 7 Jac. 1. c. 4. 3 Car. 1. c. 4. 13 & 14 Car. 2. c. 12. 6 Geo. 2. c. 24. and 13 G. 2. c. 82.

quashed. In answer to which he suggested, that the order being one and entire could not be divided. But the learned Judge said, that the justices themselves had separated the sums in their order.

Lord ELLENBOROUGH, C. J. The first objection made is, that there is no adjudication of the parish where the child was born: but when the order states, that whereas it *appears* to the justices on the oath of the mother that *she was delivered of the child in the parish of Newington*: we must understand it as an affirmative proposition by the justices that the fact was sworn to by the mother before them, and that they find it to be true; for they proceed upon that ground to adjudicate that the defendant is *the reputed father*, and that for the better relief of that parish he shall pay such and such sums: and by the statute, giving relief in this case, the reputed father is only bound to pay such relief to the parish in which the bastard child is born. And there is no case where an order in this form has ever been held to be bad: for in *The King v. Butcher*, which was supposed to come nearest to this, the ambiguity was of another sort. Secondly, it is objected that there is no express power given by any of the statutes to the justices to award *costs* in this matter; and that, without that, they have no such power. The only words of the stat. 18 Eliz, relied on are, that the order is to be made for *the better relief* of the parish; which it is said, cannot effectually be relieved, without such a power. But there does not appear to be any instance from the passing of the statute to the present time when the justices have awarded costs: the only case which has been found seeming at all to bear the other way is that of *The King v. Nelson*: but upon looking into it more accurately, it appears that the award of the costs there to be paid was by the order of this Court upon the removal of the original order by *certiorari*; and those it is evident were costs incurred subsequent to the making of the original order, by the very terms of it. Under what particular circumstances those costs were awarded does not appear, as there is no recital of the matter in the order itself. The case of *The King v. Skinn* may indeed be open to the answer which has been given, that at any rate the Sessions could not delegate the powers of taxing the costs: otherwise it would bear against the power contended for. In *The King v. Moravia* the question turned on the generality of the award of "*incident charges and expences*:" but the charges and expences there meant were such as were *incident to the maintenance of the child*. There is therefore no case which enables us to put the construction contended for on the words of the statute of *Elizabeth*, as giving the justices authority to award costs in this case. Then let us look to the reason and view of the statute itself to see if such must have been the intention of the Legislature; for it might not be too late even now to put a right judicial construction upon it, if a wrong construction had been put upon it by usage. But there is nothing appearing in the statute which necessarily requires such a power to be given to the justices: the mischiefs recited are the charges of keeping the bastard children, and the evil example of others; for each of which a particular remedy is given; the one by making an order for the charges already incurred by the parish on account of the child, and for its future maintenance; the other by the punishment of the lewd mother and reputed father. Therefore neither in express terms, nor by fair inference, is there any power given to the justices to order the costs of obtaining the order to be paid by the defendant: the order therefore is bad pro tanto; but it is good for the rest, as the justices have distinguished how much was given for maintenance, and how much for costs. And this very case shews the inconvenience which would arise from extending the power of the justices in this respect; for much additional expence has been incurred by going to the Sessions to get an original order of filiation, instead of applying to two magistrates near at hand.

GROSE, J. I still feel a difficulty in saying that the justices may not direct

the defendant to pay the costs of the parish obtaining the order. It is true, that the expences may be improperly enhanced by going in the first instance to the Quarter Sessions, instead of applying to two neighbouring justices, where that may be done ; but of that the justices will judge in considering the *quantum* of costs. But as the Sessions have an original jurisdiction in this matter, and the words of the statute of *Elizabeth* being, that the justices shall take order "*for the better relief of every such parish in part or in all ;*" and this being a remedial law ; it did appear to me that the justices had a power of directing the fair and necessary expences of the parish in obtaining the relief granted to be paid to them ; otherwise, so far from taking order for their better relief in part or in all, the parish may in some cases be more burthened by the expence of obtaining the order than by the maintenance of the child. However, as my Lord and my Brothers have no doubt upon the subject, it must be presumed that they have put the right construction on the statute.

LAWRENCE, J. I agree with my Lord in the construction he has put upon the statute of *Elizabeth* : it recites two mischiefs ; the one, that the bastards are left to be kept at the charges of the parish where they are born ; the other, the evil example and encouragement of lewd life : and it directs that the justices shall take order as well for the punishment of the parents, as also for the *better relief* of the parish. Now, these latter words being general, we must collect what relief the Legislature intended by adverting to the mischief before recited, which was that the parish was left burthened with the charges of keeping the child. this cannot include the costs to be afterwards incurred in obtaining the order of filiation and maintenance. But if the words were more doubtful than they are ; yet after so great a lapse of time since the passing of the act, without any case having put so extended a construction on the words in question, and costs not having till now ever been ordered to be paid by the justices ; it would be going too far at this time of day to say, that they have the power of awarding costs. With respect to the case of *The King v. Nelson*, it is clear that the costs there spoken of meant the costs incurred in this Court ; the report in *Ventris* points to the costs of suing out the *certiorari*. This court has no original jurisdiction to make an order of filiation : they could only quash or confirm the order of the justices below. But if they confirm the order, and thought that it had been vexatiously removed hither by *certiorari*, they might very well order the defendant to pay the costs incurred in this court.

LE BLANC, J. This is a new attempt to give the justices below a power of awarding costs in this case, which they never exercised before, and in my opinion never had under the statute of *Elizabeth*. The power conferred on the justices of giving relief to the burthened parish, in part or in all, must be confined to relief against the mischief before recited, that of maintaining the child born in such parish, and cannot be applied to the subsequent expence of procuring an order of filiation and maintenance. And this I think would be the proper construction of the words, even if they were found in a recent act of parliament, which was now to have a construction put upon it for the first time. But such it appears has always been considered to be the true construction of the act : and a strong argument is to be drawn from the case of *The King v. Moravia*, where the very ground on which the Court confirmed the order for the payment of a gross sum, "*for the maintenance of the child and other incidental charges and expences,*" was, because they considered those other incident charges and expences as confined to charges and expences attending the maintenance of the child : considering that, unless so confined, the order would have been bad. So much, therefore, of the order as directs the payment of costs must be quashed ; but it must be confirmed for the rest, the order itself having separated the sums to be paid.

Order quashed as to the payment of the costs.

Timson and Others v. Merac and Another.

9 East, 35. Nov. 13, 1807.

The stat. 43 G. 3. c. 153. s. 15. having enabled the king by order in council to license the importation of certain goods, being *British* or neutral property, from the enemy's country, in neutral ships; a contract made by *A.* and *B.* *British* subjects, (the plaintiffs) for the purchase of brandy from a house of trade in *France* (an enemy,) to be shipped from thence in a neutral, on account of *A.* and *B.*; which contract was made *in contemplation of obtaining a license* for that purpose; which license was accordingly obtained soon after the making of such contract, and before it was begun to be executed; is a legal contract, and may lawfully be guaranteed in the first instance by *C.* and *D.* other *British* subjects (the defendants). And after such license obtained, the guarantees are liable in damages for the non-shipment of the goods by the house in *France* on board a neutral sent there for that purpose.

Though it were objected to the license legalizing such trade, that it was not made out to *A.* and *B.* by name, but only to *C.* and *D.* and other *British* merchants; and that neither *C.* and *D.* nor even *A.* and *B.* had any property in the goods; whereas the license required the goods to be imported to be the property of the said persons or some of them; and until shipment the property continued in the house in *France*.

For neither the act of parliament nor the king's license required the owners of the property to be *individually named*; and even if the licence were to be so construed, as it only required the goods imported to be the property of "the said persons or some of them, as may be specified in their bills of lading;" and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if so, would have conveyed to them a legal or special property in the goods; the defendants *C.* and *D.* were still liable to answer in damages, upon their guarantee, as for the non-performance of a legal contract.

THE first special count of the declaration stated, that on the 1st of *September* 1806, at *London*, &c. a discourse took place between the plaintiffs and defendants, concerning the purchase, sale, and shipment of 250 puncheons of brandy for the plaintiffs by Messrs. *Gordon* and Company, then being in parts beyond the seas; but the plaintiffs not being satisfied with the responsibility of *Gordon* and Co., it was agreed between the plaintiffs and defendants, that the latter should guarantee to the former the shipment of the brandy on their account: and thereupon, in consideration of the premises, and that the plaintiffs, at the defendants' request, would agree that *Gordon* and Co. should purchase for them, the plaintiffs, and that they would buy from *Gordon* and Co. the brandy, on the terms and conditions after mentioned, the defendants promised that *Gordon* and Co. should purchase for them 250 puncheons of *Cogniac* brandy, by bills of exchange to be drawn for the same on shipment of such brandies, and forwarding in due course the bill of lading and invoices thereof; the said brandies to be purchased forthwith, and a vessel chartered in the defendants' names at a freight agreed upon by the plaintiffs, viz. for the purpose of bringing the brandies from parts beyond the seas to this kingdom. And the plaintiffs averred, that they accepted the said agreement, &c. on the terms and conditions aforesaid: and that on the 6th of *September* 1806, at *London*, &c. a vessel was chartered by the defendants for the purpose of bringing home the said brandies: which vessel on the 10th of *September* sailed from *London* to parts beyond the seas for that purpose, and on the 17th of *September*, arrived at parts beyond the seas where *Gordon* and Co. were to ship the brandies, and that the master gave notice thereof to *Gordon* and Co., and requested them to ship the brandies; and that the plaintiffs were always willing to accept and pay for the same: yet that the defendants did not perform their promise; nor did they, or *Gordon* and Co., though requested, purchase for the plaintiffs such brandy, and ship the same; but refused and neglected so to do: wherefore the vessel was obliged to return to this kingdom without the brandy: and such brandy having since greatly increased in value, the plaintiffs have thereby lost divers gains which otherwise would have accrued

to them from the performance of the defendants' promise. There was another special count on a similar agreement and guarantee for the purchase and shipment abroad, by *Gordon & Co.*, of 50 puncheons more, in addition to the 250 puncheons, of *Cogniac* brandy to be sent to the plaintiffs in this kingdom: and there were also the common money counts. The defendants pleaded the general issue; and at the trial at *Guildhall* a verdict was found for the plaintiffs, with 6000*l.* damages, subject to the opinion of the Court on the following case.

Previously to making the contract stated in the first count, it was in the contemplation of the parties that *Gordon and Co.*, then being *French* merchants residing at *Pons* in the *French* dominions, should purchase for and sell to the plaintiffs 250 puncheons of brandy, to be shipped by *Gordon and Co.* for the plaintiffs, merchants in this country; but the terms on which the brandies were to be purchased were first stated in a letter received from the defendants in the following words: "Messrs. *Timson, Wright and Co. London*, Sept. 1st, 1806, Gent. We engage that Messrs. *Gordon and Co. of Pons* shall purchase for you 250 puncheons of good and genuine *Cogniac* brandy not exceeding 105 francs p. 27 vells, first cost, to be drawn for the same direct at three usances on shipment, and forwarding in due course the bill of lading and invoices; the brandies to be purchased forthwith, and a vessel chartered in our name at a freight agreed upon by you." (Signed) *T. Merac and Co.* On the receipt of this letter, the plaintiffs, having agreed to the terms, after having copied them verbatim, wrote underneath such terms the following answer, which they sent to the defendants. "Messrs. *T. Merac and Co.* 1st Sept. 1806. Above we hand you a copy of your engagement with us for the purchase of 250 puncheons best good genuine *Cogniac* brandy for our account, guaranteed by you, and which is hereby confirmed by this our written acceptance for the same." (Signed) *Timson and Co.* A short time afterwards, the defendants offered to enter into similar engagements with the plaintiffs for *Gordon and Co.*'s shipping 50 other puncheons of brandy; which offer the plaintiffs accepted by another letter of the 6th of Sept. 1806, "under the terms and conditions of your (the defendants') former guarantee;" which letter also directed certain marks to be put on the puncheons: and this was acknowledged and acceded to by the defendants in another letter to the plaintiffs of the 8th of Sept. 1806. Under these contracts a vessel was chartered at such freight and for such purpose as are stated in the first count; which vessel proceeded to *Charente in France*, where the brandies were to be shipped; and there the master applied to *Gordon and Co.* for the shipment of them according to the contracts; the plaintiffs having always insisted on their performance; but no brandies were shipped, as agreed upon, and the vessel returned home without them. The price of such brandy afterwards rose, and the plaintiffs lost the benefit of the rise of the market. The contracts were made in time of war between this country and *France*; but by the stat. 49 Geo. 3. c. 153. s. 15., reciting that since the commencement of the present hostilities an order of council had been made for granting licenses, which had accordingly been granted, to permit the importation of certain goods, being *British* or neutral property, contrary to the laws then in force; which importations were necessary during hostilities, and ought to be justified by law: and that it was expedient that his majesty by order of council should be authorised to permit, during the continuance of hostilities, &c. the importation in neutral ships of any goods from any port or place of the enemy; it is enacted, that every importation of goods made by virtue of any such order and licence, &c. should be deemed to be good in law, notwithstanding any other act of parliament to the contrary. And by s. 16, his majesty is empowered by order in council from time to time to permit, during the continuance of hostilities, &c. any such goods as should be specified in any such order in council to be imported from any port or place of the enemy, in neutral ships.

Under this act the king, by order in council of the 14th of *September* 1803, licensed the importation of brandy (amongst other things,) being neutral property, or the property of *British* subjects duly licensed, from any port or place of the enemy in any neutral ship; in which order there was a proviso that nothing therein contained should extend to authorize any *British* subject to trade from any port or place belonging to an enemy without licence for that purpose duly obtained. On the 16th of *September* 1806, the following licence was duly obtained for the importation of a cargo as therein mentioned, by the *American* ship *Sarah*, a neutral: "*George Rex, &c.* To all commanders of our ships of war, &c. Our will and pleasure is, that you permit *Theo. Merac and Co. and other British merchants*, on board the *American* ship *Sarah*, *J. S.* master, to import one cargo without molestation from any port of *France*, &c. to any port of the United Kingdom, either directly or circuitously, salted provisions of all sorts, seeds, saffron, &c. (enumerating various articles,) and brandy; being the property of the said persons, or some of them, as may be specified in their bills of lading; provided the same shall be shipped as aforesaid. This licence to remain in force for six months from the date, &c. Provided also, that any person who shall claim the benefit of the licence hereby granted shall take and have the same upon condition, that if any question arises in any of our Courts of Admiralty or elsewhere, whether such person or persons hath or have in all points conformed thereto, in all cases whatever the proof shall lie on the person or persons using this our licence, or claiming the benefit thereof: Given at our Court, &c. the 16th of *Sept.* 1806, &c. (Directed) *Theo. Merac and Co. et al.* Licence to import." *Charente* is a port of *France* to which the licence extended. If the plaintiffs were entitled to recover, the verdict was to stand; if not, a nonsuit was to be entered.

Lawes, for the defendants, contended that this was only a licence to *Merac and Co.* to trade; and they having no property in the goods, but only having guaranteed the performance of the contract by *Gordon and Co.* abroad, the owners were not properly described, as required in the licence; which was therefore void, and the trading illegal; and if so, the contract of guarantee could not be enforced(a). The stat. 43 Geo. 3. c. 153. s. 15, enabling the king in council to grant licences to trade with the enemy in certain cases, recites the expediency of such licences to permit the importation of certain goods being *British or neutral property* from the enemy's ports; and the licence granted is confined to the importation of such property; and the onus probandi laid on the party claiming the benefit of the licence. It ought therefore to appear on the face of the licence itself to whom the property belongs: though it may not be necessary under the terms, "*and other British merchants*," to name every individual who is entitled to a share of the adventure. But here the only persons named are *T. Merac and Co.*, who have no property whatever in it. But admitting that the plaintiffs might claim any property of theirs obtained through the licence, under the general description of *British merchants*, it does not appear that even they had any property in the brandy at the time of the licence obtained, or down to the present moment. Until the brandy was actually purchased the property remained in the enemy's subjects, and nothing has happened to transfer it from them to any *British* or neutral subject: it was not therefore the proper subject of a licence, merely because the plaintiffs, or any other persons answering that description, might eventually acquire a property in it.

Holroyd observed shortly, that the act of parliament looked only to the property of the goods to be licensed at the time of their importation, and

(a) The purchasing goods in an enemy's country to be sent here is illegal without the king's licence. *Potts v. Bell*, 8 Term Rep. 548, and *Vanduyck v. Whitmore*, 3 East, 475. But it was admitted, that if the trading were legalized by the licence, the contract of guarantee of such trading was incidentally legalized also; according to *Kensington v. Inglis*, 8 East, 278.

legalized the trading prospectively, without which it could not be carried on at all. The license was to permit *T. Merac and Co. and other British merchants* (which included all others of that description) to import one cargo of the goods specified, being the property of some of the said persons, *as may be specified in their bills of lading, &c.* Now here there were no bills of lading; and therefore it could not be told that the bills would not specify the persons who had the property in the goods; nor can it be presumed that every thing required by the act of parliament and the king's licence would not have been performed: but it is enough in this case that the contract of guarantie made by the defendants was lawful, being made in contemplation of a lawful licence.

LORD ELLENBOROUGH, C. J. It is not necessary to argue the case further. The trading in this case, in contemplation of which the contract of guarantie was made, was not absolutely and at all events illegal, but legal *sub modo*, that is, provided the parties obtained a licence from the crown, under the order of council to import the goods; which licence, when obtained, would legalize the contract in *France* for the purchase of such goods. The end being legitimate, the means necessary to its completion must be so too. In contemplation of the licence, *Merac and Co.*, who appear to have been the correspondents of *Gordon and Co.*, then residing in *France*, contracted with the plaintiffs for the supply of a quantity of brandy by *Gordon and Co.* on certain terms, and *Merac and Co.* guarantied to the plaintiffs the shipment of it by *Gordon and Co.* from *France*, on account of the plaintiffs, on the terms agreed upon. A licence was then obtained for "*Merac and Co. and other British merchants,*" to import in an *American* ship the brandy; being, as it is stated, *the property of the said persons or some of them, as may be specified in their bills of lading.* And the question now is, whether the licence be void, because it does not specify the names of the plaintiffs, whose property this would have been upon the shipment and importation into this kingdom. If the licence had only extended to cover the property of *Merac and Co.* and they had had no other interest in the goods than appears upon the statement of this case, it might have been contended not to be sufficient to cover this adventure; but it includes *other British merchants*: and it afterwards says, "*being the property of the said persons or some of them.*" It might indeed have been a more certain means of avoiding fraud if the names of the persons really interested were specified in the licence; but the act of parliament does not require this: and it appeared at the trial that the licence in question was in the common form. The articles, however, licensed to be imported are specified, together with the ship, and the time; and there could be no more than that ship could contain in one cargo; and these checks seem to have been thought sufficient for the purpose in view, without greater particularity. There being then no vice in the original contract, there is no reason why the plaintiffs should not recover against these defendants upon the contract of guarantie which they entered into for the due performance of the original contract, which the persons abroad have failed to perform.

GROSE, J. declared himself of the same opinion.

LAWRENCE, J. The circumstances of the case shew that the contract was entered into by these parties in contemplation of acquiring a licence to make the trading legal; which was accordingly obtained: and the contract being lawful, the defendants are necessarily liable on their guarantie for the non-performance of it.

LE BLANC, J. The question turns on the legality of the contract, which must have been made before the licence was obtained. There existed, however, before the contract was made, an act of parliament enabling the king in council to make orders and to grant licences for trading with the enemy. Then the contract in question was made in contemplation of such a

licence, which was in fact afterwards obtained. The licence is to *Merac* and Co. and other British merchants to import the brandy, "being the property of the said persons, or some of them, as may be specified in their bills of lading." Now, supposing it were necessary to have named in the licence the particular persons to whom the property was consigned, it does not appear but that *Merac* and Co. might have had the bills of lading made out to them if the contract had been executed, which would have given them the legal property in the goods. So that the legality of the contract, the performance of which the defendants have guaranteed, stands clear of all objection(1).

Postea to the Plaintiffs.

Ex parte John Caruthers.

9 East, 44. Nov. 21, 1807.

The stat. 13 G. 2. c. 28. s. 5, exempting from the impress service any harpooner, &c. or seaman in the *Greenland* fishery trade, is impliedly repealed by the stat. 26 G. 3. c. 41. s. 17, which exempts such harpooner, &c. whose name shall be inserted in a list, required to be delivered on oath by the owner of the vessel to the collector of the customs; and which also exempts any seaman, entered to proceed on the said fishery in the following season, whose name shall be inserted in a list to be delivered as aforesaid, and who shall have given security, &c. to proceed, and shall proceed accordingly; for the latter statute superadds the insertion of the seaman's name in such list as a condition precedent to the exemption.

THIS was the case of an impressed seaman on board his majesty's ship *Texel* for whose liberation a writ of *habeas corpus* had been sued out before a Judge at Chambers, grounded upon an affidavit, stating, that by an agreement in writing, under seal, dated the 11th of *March* 1807, between the master and part owner of the ship *Experiment*, then bound on a voyage to the *Greenland* seas, &c. and the officers and seamen of the said ship, the latter agreed to go on the said voyage in that ship. That *Caruthers* executed the agreement as a carpenter and seaman, and entered on and performed the voyage, and on the 30th of *July* last, impressed from on board the *Experiment* at sea, on her return home(a) from *Greenland*, and carried on board the *Texel*. That he did not enter into the king's service, nor receive the bounty. And it concluded by claiming for him an exemption from being impressed until the voyage was completed. A rule nisi was obtained in this term for quashing the writ *quia improvide emanavit*, when it appeared to have been granted upon the stat. 13 Geo. 2. c. 28. s. 5. relating to the *Greenland* trade; which enacts, "that no harpooner, line manager, boat steerer, or seaman, who shall be in or belonging to any vessel in the *Greenland* fishery trade, shall be impressed from the said service; and that any such harpooner, &c. or seaman may, during the time of the year that he or they are not employed in the said fishery, sail in the colliery trade, upon giving security to the satisfaction of the commissioners of the customs that he or they will proceed in the said vessel to *Greenland*, &c. on the whale fishery the next season." Then the stat. 26 Geo. 3. 41. s. 17. enacts, "that no harpooner, line manager, or boat steerer, who shall be in or belong to any vessel in the *Greenland* fishery trade, and whose name (distinguishing the capacity in which he is to act) shall be inserted in a list, which is hereby required to be delivered on oath by the owner of such vessel to be the collector of the customs, &c.) shall be impressed from the said service: and that any such harpooner, &c. may, during the time of the year that he is not employed in the said fishery, sail in the colliery trade; upon

(1) Vide *Shipner v. Gordon & al.* 12 East 296. and *Barlow v. McIntosh*, 12 East 311.

(a) This was afterwards admitted to be while the ship was on her voyage home.

"giving security to the satisfaction of the commissioners of the customs that he will proceed in the said vessel to the *Greenland* seas, &c. the next season: and that every *seaman* or *common mariner*, who, after the first of *February* in any year, shall be entered to serve on board any ship which shall be intended to proceed on the said fishery in the following season, *whose name shall be inserted in a list to be delivered as aforesaid, and who shall have given security* to the satisfaction of the commissioners of the customs to proceed, and shall proceed accordingly, *shall be privileged and exempt from being impressed* from or out of the said service from the said 1st of *February* until after the expiration of the then next season for the said fishery, and until the voyage home from thence shall be fully complete and ended, and no longer; any law, &c. to the contrary notwithstanding." Then the stat. 26 G. 3. c. 50, repeals part of the stat. 15 Geo. 3. c. 31, and the stat. 16 Geo. 3. c. 47, and every act and part of an act repealed by either of them (not including the stat. 13 Geo. 2. c. 28.) and regulates the *Greenland* trade; and provides by s. 25, "that no harpooner, line manager, or boat steerer," (omitting *seamen*,) "belonging to any vessel fitted out on the aforesaid fishery, shall be impressed from the said service, but shall be and is hereby privileged and exempt from being impressed, so long as he shall belong to and be employed on board any vessel whatever in the fishery aforesaid." The stat. 28 Geo. 3. c. 20, makes some further regulations as to the trade. And, lastly, the stat. 35 Geo. 3. c. 92, repeals the stat. 26 Geo. 3. c. 50, and 28 Geo. 3. c. 20, and every act and part of an act repealed by either of them: and after regulating the trade, re-enacts the 25th sect. of the stat. 26 Geo. 3. c. 50, *in totidem verbis*(a).

Marryat, in shewing cause against the rule, contended, that the stat. 13 Geo. 2. c. 28. s. 5., extending the protection to seamen generally in the *Greenland* trade, remained unrepealed; not being inconsistent with the provision in the 17th sect. of the stat. 26 Geo. 3. c. 41, which went to exempt the seaman whose name was inserted in the list there described from being impressed as well *before*, as during the continuance of the service: and here the man was pressed during the actual service. But if such insertion of his name in the list, as required by the latter statute, were a condition precedent to his right of exemption: (an opinion which the court had before intimated;) then he argued that the act being to be done by another person, and not by the party himself, the omission of it ought not to prejudice the latter.

The *Attorney-General* and *Jervis* were to have supported the rule; and stated further that the party had not given any security, as required by the act. But

The Court were clearly of opinion, that the insertion of the seaman's name in the list was, by the express terms of the clause, made a condition precedent to the exemption; and that the act of the 26 Geo. 3. c. 41. s. 17, repealed by implication(b); the general provision of the stat. 13 Geo. 2. c. 28. s. 5, by requiring something more to be done than the mere act of entering on board a *Greenland* vessel, in order to protect the seaman from being impressed: and therefore they made the rule absolute for quashing the writ of *habeas corpus*; and remanded the party to his former station on board the king's ship. And Lord *Ellenborough*, C. J. intimated, that if he had been deprived of his privilege by the default of any other person he might have his remedy of another sort against him.

Rule absolute.

(a) Vide also the stat. 42 G. 3. c. 22. s. 2. protecting a certain number of harpooners, line managers, and steersmen, in proportion to the tonnage, from being impressed.

(b) The rule, as laid down by *Eyre, J.* in *Harcourt v. Fox*, 1 Show. 520, is, "that statutes introductive of a new law, penned in the affirmative, do always repeal former statutes concerning the same matter, as implying a negative."

Knight v. Criddle.

9 East, 48. Nov. 21, 1807.

The Court will not order the sheriff to retain, in satisfaction of a present writ of *fi. fa.* issued by the plaintiff against the defendant, *money* or *bank notes*, which the sheriff had before received for the use of the defendant, in discharge of an execution levied by the defendant against another, and which the sheriff had not paid over.

THE present defendant had recovered judgment and sued out execution against one *S. H.* for his debt and costs; and in discharge of that execution *S. H.* paid into the hands of the sheriff of *Hants* 60*l.* in bank notes: and before that money was paid over, the present plaintiff recovered judgment and sued out his writ of *fi. fa.* for 33*l.* 10*s.* debt and costs against the defendant, which was delivered to the same sheriff. And now, upon an affidavit of these facts by the sheriff's officer, and that he had, in pursuance of the sheriff's warrant levied the debt and costs in this cause out of the 60*l.* in bank notes remaining in the sheriff's hands, and that he could not find any other goods and chattels of the defendant whereof to levy the said debt and costs;

Gaselee moved for a rule to shew cause why the sheriff of *Hants* should not pay over to the plaintiff the amount of his debt and costs in this cause out of the sum received by him on account of the defendant, as before mentioned; and in the mean time retain the said sum in his hands. And he cited *Armistead v. Philpot*, Dougl. 230, where a similar rule was made absolute, without opposition, except so far as to secure the attorney's lien for his bill. But by

Lord ELLENBOROUGH, C. J. We ought not to force the defendant to come here to shew cause against a rule founded on the assumption, that money (and bank notes for this purpose are the same) may be taken in execution. It is an innovation on the law, which ought not to be admitted. The case in *Douglas* was by consent. The other judges concurred in refusing to grant a rule to shew cause(a).

Taylor v. Lendey.

9 East, 49. Nov. 24, 1807.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor: which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the work-house for the use of the poor: may, at any rate, countermand the application of the money before it is so applied; and may recover it back in an action for money had and received.

IN *assumpsit* for money had and received, &c. a verdict was taken for the plaintiff at the last assizes at *Exeter*, for 5*l.* 5*s.* subject to the opinion of the Court on this case. Mr. *Tucker*, a justice of the peace for the county of *Devon*, had directed a constable and his assistant to take a man, who had been charged before him with an unnatural crime, to a public house, and there keep him in custody while his commitment was making out. The plaintiff, an innkeeper, and one *Hill*, who were waiting to see the magistrate on business, were in the same room. The magistrate came to the door of the public house with the commitment, and both the constable and his assistant went out to him; and while they were out, the prisoner, who was left in the room with

(a) Upon the same principle that money cannot be taken in execution, this Court in *Fieldhouse v. Croft*, 4 East, 510, refused to stay in the sheriff's hands even the surplus of a former execution against the defendant's goods at the suit of the same plaintiff, for the purpose of satisfying a new execution. [Vide *Williams v. Rogers*, 5 Johns. 163. 167.]

Hill and the plaintiff, (who knew he was in custody,) made his escape; but was shortly after retaken, and represented to the magistrate that the plaintiff had encouraged him to run away; which the plaintiff and *Hill* denied. The plaintiff and *Hill* were summoned before the magistrate the next morning, when the prisoner was examined, and swore to his former assertion, which was denied by the plaintiff and *Hill*. The magistrate said, that some notice must be taken of this; and the plaintiff said he was ready to answer any charge which was brought against him. The plaintiff being much agitated in consequence of this charge against him, became dangerously ill, and was confined to his bed; when his brother, after consulting with the plaintiff's wife, applied to the magistrate, stated the plaintiff's situation, desired him to relieve his brother's mind, and said that he would pay any sum the magistrate should think proper to get rid of the charge. The magistrate in consequence of this representation, said, that he thought reparation would be made to the public if the plaintiff paid five guineas to the defendant, who is governor of the poor house at *Axminster*, for the use of the poor of *Axminster*; and that if that were done, he would not go on with any prosecution against the plaintiff. This was acceded to, and the money paid to the defendant by the plaintiff's brother, on his behalf; and nothing more has been done in the prosecution against the plaintiff. The plaintiff, when he recovered, was dissatisfied with what had been done, and applied to the defendant to have his money back again, which was then remaining with the defendant; but this was refused; and this action was thereupon brought. If the plaintiff were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Lens, Serjt. for the plaintiff, contended, that the defendant being in the nature of a stakeholder, having received the plaintiff's money without consideration, and having had notice to return it before it was paid over to the poor, for whose use it was so received, was liable to the plaintiff in this action. The money was paid to the defendant without consideration, or upon one that was illegal; for it was paid on the supposition that the plaintiff had been guilty of a public misdemeanor, and in order to redeem him from prosecution. If it had been paid by the plaintiff voluntarily, there might have been a difficulty in his recovering it back; though still the situation of the defendant as a stakeholder would have made his authority revocable while it was executory; but the case shews that the money was paid under a threat of prosecution, and in order to avoid it. If the plaintiff were really guilty of the offence with which he was charged, the prosecution ought not to have been stopped on account of his paying a sum of money for a purpose wholly collateral to the transaction: if innocent, as he insisted that he was, then the money was illegally extorted from him under a threat of a prosecution, to redeem himself from the expence and vexation of which it was paid; and was therefore paid under duress. His guilt or innocence was not put in question. If the act in respect of which the payment was made were in itself illegal, and the parties in *pari delicto*, the money could not have been recovered back again: but here the parties were not in *pari delicto*, but it was paid by the plaintiff to relieve himself from the vexation and expence of a prosecution, and may therefore be recovered back. As in *Williams v. Hedley*, 8 East, 378, money paid by the plaintiff to the defendant, in order to compromise a *qui tam* action for usury, was held to be recoverable back; considering that the prohibition and penalties of the stat. 18 Eliz. c. 5, only attached upon the compounding informer, and not upon the party paying the composition, who was therefore not in *pari delicto*. And the Court would not in that shape enter into the consideration whether the plaintiff had been guilty of the usury with which he was charged. But even if this payment had been made upon an illegal consideration; yet the defendant standing in the situation of a middleman or stakeholder, it was competent for the plaintiff to revoke his authority before the money was actually paid over and applied

to the use of the poor: as in *Cotton v. Thurland*, 5 Term Rep. 406, where money deposited with a stakeholder, upon a wager on the event of a battle to be fought by the parties to the wager, was recovered back even after the battle was fought; notice having been given by the plaintiff to the stakeholder, before it was paid over, not to pay it.

Lord ELLENBOROUGH, C. J. then called upon the counsel for the defendant to distinguish this, if he could, from the case of the stakeholder, having received notice to pay back money deposited before it had been applied; and intimated that the defendant was to be considered as an agent for the party paying the money to be applied to the use of the poor; and being an agent, his authority was revocable, and was actually revoked before the money was paid over.

Disney, for the defendant, denied that the money had been paid by the plaintiff under duress: he was not in custody at the time; nor was he threatened with the prosecution if he did not pay it; but the payment was proposed to be made voluntarily on his behalf, upon an implied admission of the offence imputed to him, and as a satisfaction to the public for it. And he contended that the defendant was entitled to retain the money so paid, either on the ground that the transaction was legal, and that it was competent to the magistrate to agree to forego the prosecution upon the submission and confession of the plaintiff, and his paying the five guineas for the use of the poor, as a public satisfaction for the offence; in which case the plaintiff had a sufficient consideration for the payment; or on the ground that if the transaction were illegal, the plaintiff was in *pari delicto*, and therefore could not recover back the money so paid: or that supposing both parties to have mistaken the law, in this respect, yet that money paid under such mistake cannot be recovered back. This, he said, was distinguishable from *Collins v. Blanton*, 2 Wils. 341. 347; for there the prosecution, which was for perjury, had proceeded to trial, and the agreement was corruptly made for the benefit of the prosecutor, who on that account forbore to appear and prosecute; but here no benefit was reserved to any individual, but only to the public; and there was no corrupt stipulation to stifle justice, but all the parties acted *bona fide*.

Lord ELLENBOROUGH, C. J. This argument might have applied to a case where the defendant had paid the money over to the use of the poor for whom it was received, before notice; but how can you make it bear upon this case, where, whether the purpose were legal or illegal, the money still remained in the hands of an agent, acting under a countermandable authority, whose authority was actually countermanded by his principal before the money was applied? Take it, that the money had been paid by the plaintiff to the defendant for a charitable purpose, but before the defendant had made any application of it, the plaintiff countermanded the payment: was there not then an end of the authority; and could the agent persist in applying it against the direction of his principal? The question therefore is reduced to the case of a countermanded agent. If the master of the work-house had applied it before any countermand, it would have been too late for the countermand to have operated, and the case must have rested upon the general argument; but there is no pretence for saying that the payment to him for the use of the poor was for this purpose a payment to the poor. The case of *Cotton v. Thurland* is opposed to that argument.

Disney then said, that he had no authorities to meet the argument against him on this point.

Lord ELLENBOROUGH, C. J. The principal question meant to be agitated does not arise in this case. We may assume, for the purpose of the argument, that it would have been a legal payment, and could not have been recovered back again, if the money had been paid over before the countermand;

and still the plaintiff would be entitled to recover the money back, on the ground of the countermand.

The other Judges assenting,

Postea to the Plaintiff.

Jones, Assignee of the Sheriff of Cumberland v. Stordy.

The Same v. Blain.

9 East, 55. Nov. 24, 1807.

Where the writ was to appear before the king *whosoever he should then be in England*, and the sheriff took a bail bond for the party's appearance before the king *at Westminster* on the day named in the writ; held to be a substantial compliance with the stat. 23 H. 6. c. 9. so as to entitle the assignee of the sheriff to recover on such bond.

THESE were actions of debt by the assignee of the sheriff on bail bonds, wherein the plaintiff declared, that on the 2d of April, 47 Geo. 3. he sued out of the Court of K. B. against one *W. Moore* a special *testatum capias* writ, directed to the sheriff of *Cumberland*, by which writ the king commanded the said sheriff to take the said *W. M. &c.* "so that he might have his body before our said lord the king in 15 days of *Easter*, *whosoever our said lord the king should then be in England*, to answer" the plaintiff in a plea of trespass on the case on promises, &c.: which writ was indorsed for bail for 173*l.* and before the return thereof, was delivered to the sheriff to be executed; by virtue of which the sheriff arrested *Moore, &c.*; and took bail for his appearance, according to the form of the statute, at the return of the writ. And that the defendant *Stordy*, on the 11th of April 1807, executed the bail bond to the sheriff, (the date whereof is by mistake the 11th of March 1807,) conditioned "that if the said *W. Moore* should appear before our said lord the king at *Westminster* in 15 days of *Easter* then next following to answer" to the said plaintiff, &c. then the obligation to be void. The plaintiff then averred, that *Moore* did not appear before our said lord the king at *Westminster* in 15 days of *Easter* in the condition mentioned according to the exigency of the said writ, whereby the bail bond became forfeited. And that the money not being paid, the sheriff assigned the bond to the plaintiff according to the form of the statute, &c. by reason whereof, &c.

To this the defendant demurred, and shewed for special causes, that it appears by the declaration that the writ of special *testatum capias* commanded the sheriff to take *W. Moore, &c.* so that he might have his body before the king at a certain day therein mentioned, *whosoever our said lord the king should then be in England*, by virtue of which writ *Moore* was arrested; and that the bail bond taken by the sheriff on that arrest was conditioned for the appearance of *Moore*: "before our said lord the king at *Westminster*," and is therefore void. And also for that the said writ is a process by original, and the bail bond is taken on a process by bill, and is therefore void and null by the statute, &c. Joinder in demurrer. There were the like pleadings in the cause against the other bail.

Walker, in support of the demurrer, relied upon the variance between the writ and the condition of the bond, the latter of which does not follow the writ, as required by the stat 23 H. 6. c. 9., prohibiting sheriffs from taking any bail bonds "but by the name of their office, and upon condition written, that the prisoners shall appear at the day contained in the said writ, and in such places as the said writs, &c. shall require." Then as the stat. 28 Ed. 1. c. 5. directs the justices of his Bench to follow the king wherever he may be; and all original processes returnable into this court are made returnable *coram nobis ubicunque fuerimus in Anglia*, Co. Lit. 71. b., it might happen, if the

place of the sitting of this Court were removed from *Westminster*, that a performance of the condition of the bond would not answer the exigency of the writ: and if the bond were void for this reason at the time it was given, the continuance of this Court at *Westminster*, at the return of the writ, will not make the bond good: and consequently, it is immaterial to the validity of it in law, that in fact the party did comply with the condition, and did put in special bail. In *Burton v. Lowe*, Sty. 234., the condition of the bond was to appear on such a day in *Cancellaria apud Westmonasterium ubicunque fuerit*; and on demurrer, it was holden ill for the variance. And Rolfe, C. J. said, that, "neither the Upper Bench nor the Chancery are fixed courts: and therefore the defendant ought not to be bound precisely to appear at *Westminster*; and then to add *ubicunque fuerit* is a material variance, and makes the bond naught." In a subsequent case, indeed, of *Lawson v. Haddock*, 2 Vent. 237, similar to the present, where the former case was cited, it was said, that of later times the Courts had not been so strict upon the wording of bail bonds; but the court came to no decision upon it, and ordered it to be further spoken to at the bar. And since then, in *Samuel v. Evans*, 2 Term Rep. 569, where the writ was returnable on *Monday next after the morrow of All Souls*, (the 6th of November), and the sheriff, on the 4th of November, arrested the defendant, and took a bail bond conditioned for his appearance on the *morrow of All Souls* (3d of November); after verdict in an action by the sheriff's assignee, the judgment was arrested, because it was impossible that any appearance according to the condition of the bond could have answered the purposes of the writ.

Lawes, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. If any inconvenience could have ensued to the party from his being deceived by the sheriff's taking the bond with a condition in this form, we might have corrected it on motion. But this is a bond taken in all its essential parts according to the statute. There is a day named in the writ, but no certain place: and the condition of the bond is rightly taken to appear on the day named: and instead of requiring the party's appearance wherever the king shall then be in *England*, *Westminster* is mentioned in terms, which, according to the common understanding of every body at this day, (considering that this Court has been invariably held here for many centuries, except only when it was removed for a short period to *Oxford* in 1665(a),) is the place meant by the more general description in the writ. The variance in this case is certainly not greater than in *Skuttleworth v. Pilkington*, 1 Stra. 1155, where the writ was returnable *coram domino rege ubicunque tunc fuerit in Anglia*, and the bail bond was conditioned to appear *coram domino rege* generally: which was held sufficient; for the Court said they would understand an appearance "before the king" to mean "before the king in his court," and not before him *in person*.

Per Curiam,

Judgment for the Plaintiff(b).

(a) Vide 4 Black. Com. 265.

(b) See all the cases collected in Mr. Serjt. Williams's Note to *Posters v. Hanson*, 2 Saund. 59. a. &c.

Doe, on the Demise of Richard Otley, v. Catharine Manning, Widow, and S. Goom.

9 East, 50. Nov. 25, 1807.

A voluntary settlement of lands made in consideration of natural love and affection, is void as against a subsequent purchaser for a valuable consideration; though with notice of the prior settlement before all the purchase money was paid or the deeds executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction; for the law, which is in all cases the judge of fraud and equity arising out of facts and intents, infers fraud in this case, upon the construction of the stat. 27 Eliz. c. 4.

IN ejectment for certain messuages and premises at *St. Mary Magdalen, Bermondsey, in Surry*; a verdict was found for the defendants, subject to the opinion of the Court on the following case. *Thomas Clendon*, being seised in fee of the premises in question, by his will of the 6th of *March*, 1750, duly executed and attested, devised the premises (amongst others) to his nephew *William Clendon* for life; remainder to trustees during *W. C.*'s life to preserve contingent remainders; remainder to the first and other sons of *W. C.* successively in tail male; remainder to the testator's nephew, *Owen Manning*, for life; remainder to trustees during *O. M.*'s life to support contingent remainders; remainder to the first and other sons of *O. M.* successively in tail male; remainder to his own right heirs for ever; and gave the usual powers of leasing, in possession, at rack rents, for 21 years; and also power to each of the devisees, when in actual possession, to settle upon such person as he should marry, for her jointure, premises of the yearly value of 50*l.* for every 1000*l.* he should receive with such wife. The testator died seised of the premises in 1751; and *Wm. Clendon*, his nephew, died in *March* 1764, without issue, whereby the estate descended to *O. Manning*, the next tenant for life, in remainder. By indenture of bargain and sale of the 25th of *November*, 1753, duly enrolled in C. B., between *Owen Manning* and *George Owen Manning*, his eldest son, of the 1st part, *T. Green* of the 2d part, and *P. Willson* of the 3d part, *Owen Manning* and *George*, his son, sold and conveyed the premises to *Green* in fee, to the intent that he might become tenant thereof, for the purpose of suffering a recovery, to the use of *O. Manning* and his assigns for life; remainder to the said *G. O. Manning* in fee; and a recovery was accordingly suffered in *Hil.* term 28 Geo. 3. On the 15th of *March*, 1783, *G. O. Manning* died intestate, and without issue; whereby the reversion in fee descended to *John Manning* his brother and heir at law. By indentures of lease and release of the 11th and 12th of *April* 1783, between *Owen Manning*, who was then in possession, of the first part, the said *John Manning* of the second part, and *W. Gill* and *H. S. Gill* of the third part; reciting the former indenture of bargain and sale, and the recovery, and the death of *G. O. Manning*, and that divers other messuages, &c. having in like manner descended to the said *John Manning*, he was desirous of making some settlement and provision for the benefit of his mother, in case she should survive *Owen Manning*, and of his sisters and younger brother; it was witnessed, that in consideration of the natural love and affection which *John Manning* bore towards *Catharine Manning* his mother, and *Jane*, *Catharine Matilda*, *Ann*, and *Matilda Manning*, his sisters, and *Charles Manning* his brother, and for making provision for them for their respective lives, and of 10*l.* &c.; *Owen Manning* and *John Manning* conveyed to *W.* and *H. S. Gill* in fee, amongst others, all the said premises, habendum, &c. to the use of *Owen Manning* for life, sans waste; remainder to the use of the trustees during the life of *O. M.*, in trust to preserve contingent remainders: remainder to the use of *Catharine Manning* for life, sans waste; remainder to the trus-

tees and their heirs; upon trust during the lives of *Jane, Catharine Matilda, Ann, Matilda, and Charles Manning*, and the survivor of them, to receive the rents, &c.; and pay the same equally amongst his said sisters and brother, and to the survivor of them; remainder to *John Manning* in fee: with the like power of leasing as is contained in *Clendon's* will; and a power for *Owen Manning*, during his life, and *Catharine* his mother, during her life, with the privity and consent of *John Manning* and the trustees, or the survivor, his heirs or assigns, testified as therein mentioned; and for *John Manning*, after his father's and mother's decease, with the like privity of the trustees, or the survivor, his heirs or assigns, testified as aforesaid; to execute like leases for 99 years. *Owen Manning* died the 9th of Sept. 1801. By indentures of lease and release of the 16th and 17th of May 1805, between *John Manning* of the first part, *R. Otley* of the second part; and *H. Otley* of the third part; reciting the indenture of bargain and sale of the 25th of November, 1783, and the deaths of *George Owen Manning* and *Owen Manning*, and that *John Manning* had contracted with *R. Otley* for the absolute sale of the premises; it was witnessed, that in consideration of 1800*l.* to *John Manning* paid, he conveyed to *R. and H. Otley* in fee all the said premises for which this ejectment was brought, being part of the premises in the last-mentioned deed; habendum to such uses as *R. Otley* should appoint; and in the mean time, and subject thereto, to the use of *R. Otley* in fee. The consideration for the conveyance to the lessor of the plaintiff was paid thus; by a book debt from *John Manning* to the lessor of plaintiff 417*l.* 2*s.* 9*d.* By cash at sundry times 1392*l.* 17*s.* 3*d.* The book debt was contracted, and 160*l.* of the consideration money paid, at the date of the purchase contract, and 387*l.* 5*s.* 6*d.* at a subsequent period, but before the execution of the conveyance of 1805, and before the lessor of the plaintiff had notice of the deed of 1783. The residue of the consideration was paid, and the deeds executed, subsequent to such notice. *John Manning* did not divest himself of all his property by the conveyance of the 12th of April 1783. There was no fraud in the last-mentioned conveyance, unless fraud is to be implied by construction or operation of law. The question for the opinion of the Court was, Whether the lessor of the plaintiff were entitled to recover against the defendant *Manning*? If the Court should be of opinion that he was, a new trial was to be had, or an issue granted, as the Court should direct, between the plaintiff and defendant *Goom*, to try the validity of his lease. If the verdict on such new trial or issue should be found against *Goom*, a verdict was to be entered against both the defendants. But if the Court should be of opinion that the lessor of the plaintiff was not entitled to recover against the defendant *Manning*, the verdict taken for the defendants was to stand.

This case, which first came before the Court upon a motion for a new trial, being afterwards put into its present form by the desire of the Court, was elaborately argued in last *Easter* term by *Larves* for the plaintiff, and *Best*, Serjt. for the defendants; and again, in *Trinity* term last, by *Marryat* for the plaintiff, and *Shepard*, Serjt. contra: and in the course of the arguments all the authorities bearing upon the question of the validity of voluntary conveyances upon good consideration, such as that of blood, or of natural affection, as contra-distinguished from conveyances for valuable consideration to purchasers, with or without notice of the prior conveyance, were cited and accurately discussed. But as the leading arguments and authorities were all brought in review, and weighed by the Court, in the deliberate judgment pronounced upon the case in this term, it would be needless to repeat them.

Lord ELLENBOROUGH, C. J., after stating the facts.—On this case, as it is found that there was no fraud in fact in the conveyance of the 12th of April 1783, the only point for the consideration of the Court is, whether a voluntary conveyance, without any valuable consideration, be not according to the legal construction of the stat. 27 Eliz. c. 4, fraudulent against a subsequent pur-

chaser for a valuable consideration: or, in other words, whether in such case the law do not presume fraud, without admitting such presumption to be contradicted. The cases in which the construction of the statute of the 27 of Eliz. has come on to be considered have been numerous; and in several of those which arose nearest the time of passing the statute the Judges seem to have thought that a voluntary settlement was only *prima facie* fraudulent against a purchaser, according to the language of the Court in *Sir Ralph Boy's* case, Ventris 193; where it is said, (Lord Hale being Chief Justice) "that though every voluntary conveyance carries an *evidence of fraud*: yet it "is not upon that account only *always* to be reckoned fraudulent, or to be avoided by a purchaser for a valuable consideration." And in *Jenkins v. Kemishe* or *Kemis*, which is to be found in Hardress, 398, and in 1 Lev. 150, in *Lavender v. Blackstone*, in 2 Lev. 146, and in *Garth v. Moir*, 1 Keb. 486, the same doctrine is distinctly laid down; and, in *Style*, 446, it is stated to have been said on a trial at bar, (Lord Rolle being then Chief justice) "that a voluntary conveyance upon "consideration of natural affection hath no badge of "fraud, unless he who makes it be indebted at the time, or in treaty for the sale of the lands:" which case Chief Baron Gilbert adopts, and supports by reasoning of his own, in his Law of Evidence, 236(a). And in addition to these printed cases, Sir Robert Eyre, then chief Justice of C. P., according to a MS. note formerly belonging to Mr. Justice Citty, in a case of *Standon v. Charwood*, tried before him at the London Sittings after Trinity term 1732, laid it down, that a voluntary settlement, made upon marriage by Sir Richard Anderson, was not fraudulent *quia voluntary*; but the question was, Whether it was not made with an intent to defraud: and the jury so found it. And with this doctrine other of, the cases which were cited by the counsel for the plaintiff may well agree, in which it is stated, "that conveyances were decided, *on evidence given at the bar*, to be fraudulent;" or, "that a jury were directed *on evidence*:" though it must be recollected, that these cases are not so strong as those I have alluded to, as they are not inconsistent with the possibility of juries having been directed, what ought to be their *conclusion in point of law*, from the facts given in evidence, if the jury should find them to be true; for *fraud and covin is always a question of law*; "it is the judgment of law on facts and intents." In a more modern case, where the question was upon the stat. 13 Eliz., that of *Cadogan v. Kennet*, in Cowper, 434. Lord Mansfield said, *obiter*, "the stat. 27 Eliz. c. 4, does not go to voluntary conveyances, merely as being *voluntary*; but to such as are *fraudulent*." And in a late case, of *Doe v. Rouledge*, in the same book, p. 706; where the question arose on the statute now under consideration, Lord Mansfield, in considering one point in the case, whether the settlement there, under all its circumstances, where fraudulent and covinous, stated, "that in the statute there was not a word that impeached voluntary settlements, merely as being *voluntary*, but as *fraudulent and covinous*:" and noticed the 3d section, which subjects parties to such fraudulent grants, who should attempt to defend them, to forfeiture and imprisonment, as if such practices were a crime; in which light no person making a mere voluntary settlement, by way of provision for his family, was ever considered to stand. This section furnishes most unquestionably a strong argument in favor of that construction; and had these cases not been opposed by many others of great weight and authority, there would have been but little doubt in our minds as to this construction being the right one; but we have to deal with a class of cases full as numerous, decided by Judges of the greatest eminence, which have given this statute a different construction, and have held that a conveyance without a *valuable consideration* is by the statute made void, as fraudulent, against a subsequent purchaser for *such consideration*. The earliest case in which this is distinctly laid down is *Woodie's* case, cited by *Tanfield* in *Colville v. Parker*

Cro. Jac. 168, as far back as East, 6th of Jac. 1., where it was adjudged, "that an assignment of a lease of lands by one *quasi* in jointure to his wife, he taking the profits, and afterwards selling it without notice, was within the statute; though not made in trust to be revoked, nor with any clause of revocation; because it was a voluntary conveyance at first, and shall be intended fraudulent at the beginning." In this case, though the person making the conveyance continued in possession and took the profits, it will be observed that there was no badge of fraud; as such possession accompanied and followed the deed: but the Judges might very well apprehend that subsequent purchasers might be continually defrauded by such secret conveyances, if they should be held good; and that when the question was between one, who had paid a valuable consideration for an estate, and another, who had given nothing, it was a just presumption of law, that such voluntary conveyance, founded only in considerations of affection and regard, if coupled with a subsequent sale, was meant to defraud those, who should afterwards become purchasers for a valuable consideration; and that a different construction would have so narrowed the operation of the statute as to leave the persons meant to be protected by it subject to almost all the mischiefs intended to be guarded against: and it certainly is more fit, upon the whole, that a voluntary grantee should be disappointed, than that a fair purchaser should be defrauded. In *Prodgers v. Langham*, 1 Sid. 133, a conveyance made by a man in trust for his daughter till marriage, for her maintenance, and then in trust to raise a portion for her, was held to be a voluntary conveyance in its origin, and void by the stat. 27 of Eliz. against purchasers for valuable consideration: this was in the 15th of Car. 2. In *White v. Hussey*, *Precedents in Chancery*, 14, in the beginning of King William's reign, in the case of a conveyance, where the fraud, if any, was only from its being voluntary, the commissioners of the great seal were all of opinion that they might decree a conveyance fraudulent merely from being voluntary, and that, without any trial at law. In *Gardiner v. Painter*, Cas. temp. King, C. P. 65. Lord King said, it could never be a question whether a voluntary settlement be good against purchasers. This was in the year 1726; and in the next year, in *Tonkins v. Ennis*, 1 Eq. Cas. Abr. 334., a voluntary settlement was considered as being made void against a purchaser by the stat. 27 of Eliz. And this could only have been so held from such settlement being in point of law considered as fraudulent. In *White v. Sansom*, 3 Atk. 412, though Lord Hardwicke is stated to have said, that he had heard it said in that court, that there are reasonable voluntary conveyances, which that Court will not interfere to disturb, upon the construction of these statutes; yet, according to the same case, he said, "he hardly knew an instance where a voluntary conveyance had not been held fraudulent against a subsequent purchaser." And in *Lord Townsend v. Windham*, 2 Ves. 10, he said, "on the 27th of Eliz. every voluntary conveyance made, where "afterwards there is a subsequent conveyance made for valuable consideration "though no fraud in that voluntary conveyance, nor the person making it at all "indebted; yet the determinations are, that such mere voluntary conveyance "is void at law by the subsequent purchase for valuable consideration." In *Roe v. Milton*, 2 Wils. 366, Lord Ch. J. Wilmot stated the question to be, Whether there were a good and valuable consideration to support the limitation therein to Thomas Hammerton, the father of the lessor of the plaintiff: or whether the limitation were merely voluntary under the stat. 27 of Eliz., and bad against a purchaser for valuable consideration? And the Court held it good: as the mother giving up her charge of an annuity on the whole of the estate, and taking it on a part, was considered as a valuable consideration. And Lord C. J. De Grey, in *Goodright v. Moses*, in 2 Sir W. Black. Rep. 1019, laid it down, "that the deed in question was only a voluntary conveyance "within the true meaning of the stat. 27th of Eliz.; being founded only on "a good, and not on a valuable, consideration; and therefore could not be set

"up against a *bona fide* purchaser." And the observation on this case made by the counsel for the defendant, that it seemed that Lord C. J. *De Grey* had been misled by a case in 2 Vern. 326., which he referred to: and which was said not to have been decided, and on which he was supposed to have relied; does not weaken the authority of the case in *Blackstone*; for Lord C. J. *De Grey* referred to it, not to support the opinion of the Court on the point now before us; but to shew that a lessee for years was a purchaser for a valuable consideration. Lord Mansfield himself (whose opinion in *Doe v. Routledge*, and whose dictum in *Cadogan v. Kennet*, have been much relied on,) held in the case of *Chapman v. Emery*, Cowp. 280, that a voluntary conveyance after marriage by a man on his wife and children was void by the stat. 27th of Eliz. against a subsequent mortgagee, whom he held to be a purchaser. And with respect to the case of *Doe v. Routledge*, it may be observed that Lord Mansfield seems to have supported his opinion by cases, which were not considered as cases of voluntary settlements; but as cases where the settlements had for their foundation valuable considerations: such was the case of *Newstead and Searles*, in 1 Atk. 268, which he mentioned by name: for Lord Hardwicke in that case stated "the question to be, Whether the articles of the 30th of April 1709 were for a valuable consideration, and binding, or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors and purchasers?" And afterwards he said, "I think the settlement no voluntary agreement, but a binding one; the statutes of the 13th and 27th of Eliz., that make conveyances fraudulent, are voluntary conveyances made against purchasers for a valuable consideration, or *bona fide* creditors; but it would be difficult to shew that such a limitation, as in the present case, has been held fraudulent and void against subsequent purchasers and creditors. The present is a stronger case; for here are reciprocal considerations both on the part of the husband and wife, by the provisions under the articles for the second marriage." And I believe, if it were necessary to go into the examination, it would be found that in most, if not in all of the cases cited by the defendant, there were reciprocal considerations; some benefit acquired by the persons making the settlement, which might fall under the denomination of a valuable consideration; though perhaps other persons derived a benefit from the settlement, who were not the principal objects of it. As in *Jenkins v. Keymyns*, where the consideration of a marriage and marriage portion was held to run through all the estates raised by the settlement on the marriage; though the marriage was not concerned in them. And it must be further recollected, with respect to *Doe v. Routledge*, that upon the strength of the voluntary settlement is that case a marriage was had; which was noticed by Lord Mansfield. And according to the case of *Prodgers v. Langham*, 1 Sid. 133, a voluntary conveyance, fraudulent against a subsequent purchaser, was held to be made good by a subsequent marriage. And it will be further recollected, that in *Doe v. Routledge* there was no *bona fide* purchaser. Subsequently to the case of *Chapman v. Emery*, the cases of *Evelyn v. Templar*, 2 Bro. Chan. Cas. 148, and *Doe ex dem. Bothell v. Martyr*, 1 Bos. & Pull. New Reports 332, have been determined: in the last of which it was laid down, "that it cannot now be held that a prior voluntary conveyance shall defeat a conveyance to a purchaser for a valuable consideration, without overturning the settled and decided law." And in the first of them (i. e.) *Evelyn v. Templar*, it was said by Lord Thurlow, that so many estates stand upon the rule, that it cannot be shaken. And so late as Mich. term 1804, in the case of *Doe d. Lewis v. Hopkins*, the Court of the Exchequer held; where after marriage a man covenanted to stand seised of an estate to the use of himself for life, remainder to the use of his wife for life, remainder to the heirs of the body of the wife begotten by the husband; that such settlement was void, as being voluntary against a lessee of the husband for 31 years; the son of the settlor claiming the estate after his father's death against the lessee. To the authority of

these cases may be added the case of *Nunn v. Willmors*, 8 Term Rep. 528, where Lord *Kenyon* said, "if this deed were either actually fraudulent, or *voluntary, from whence the law infers fraud*, the consequence insisted on by "the plaintiff would follow; and I admit that if this deed were a *voluntary deed, the law says it is fraudulent*." Thus stand the authorities on both sides of the question; and the weight, number, and uniformity of those which establish the point, contended for on behalf of the plaintiff, do in our opinion very much preponderate; and as many estates depend upon the rule, it ought not, we conceive, to be shaken. It appears from the MS. note I have cited, formerly belonging to Mr. *Just. Clive*, that Mr. *Horseman*, in the year 1713, advised the making a mortgage of the estate settled in strict settlement by Sir *R. Anderson* after his marriage; thinking it voluntary and fraudulent as against a purchaser, and the like advice as that which he gave nearly a century ago, probably had been given before: and that it has been given since, and acted on, we cannot doubt; as Lord *Thurlow* was not likely to have expressed himself, as he did in *Evelyn v. Templar*, unless he had known that such had frequently been the case. Feeling ourselves pressed with these authorities and considerations, we think ourselves bound to give judgment for the plaintiff. Much property has, no doubt, been purchased, and many conveyances settled upon the ground of its having been so repeatedly held, that a voluntary conveyance is fraudulent, as such, within the stat. 27th of Eliz.: and it is no new thing for the Court to hold itself concluded in matters respecting real property by former decisions upon questions, in respect of which if it were *res integra*, they probably would have come to very different conclusions. And if the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the Legislature, which is able to prevent the mischief in future, and to obviate all the inconvenient consequences which are likely to result from it, as to purchases already made. And we cannot but say, as at present advised, and considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only against purchasers for a valuable consideration, *without notice of the prior conveyance*. Our opinion being with the plaintiff, the consequence is, that there must either be a new trial, or an issue between the plaintiff and the defendant *Goom* to try the validity of his lease(1)(2).

Godsall and others v. Boldero and others.

9 East, 72. Nov. 25, 1807.

A creditor may insure the life of his debtor to the extent of his debt: but such a contract is substantially a contract of indemnity against the loss of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy; although the debtor died insolvent, and the executors were furnished with the means of payment by a third party.

THIS was an action of debt on a policy of insurance made the 29th of Nov. 1803, under seal of the defendants, as three of the directors of the Pelican Life Insurance Company, on behalf of the Company; which recited that the plaintiffs, coachmakers in *Long-acre*, being interested in the life of the Right Hon. *William Pitt*, and desirous of making an insurance thereon for 7 years, had subscribed and delivered into the office of the company the usual declaration setting forth his health and age, &c. and having paid the

(1) Vide *Taylor v. Stille*, Sug. Vend. 432.

(2) [Acc.: *Ridgway v. Underwood*, 4 W. C. C. R. 129. But see contra, *Lancaster v. Dolan*, 1 R. 281. *Foster v. Walton*, 5 W. 578, where it was held, that under the recording act of 18th March, 1775, in *Pennsylvania*, a voluntary deed, duly recorded, is as valid against a subsequent purchaser, as a deed for a valuable consideration, if untainted by actual fraud, notwithstanding the provision of the statute 27 Eliz. c. 4.—W.]

premium of 15*l.* 15*s.* as a consideration for the assurance of 500*l.* for one year from the 28th of *Nov.* 1803, it was agreed that in case Mr. *Pitt* should happen to die at any time within one year, &c., the funds of the company should be liable to *pay and make good* to the plaintiffs, their executors, &c. within three months after his demise should have been duly certified to the trustees, &c. the sum of 500*l.* And further, that that policy might be continued in force from year to year until the expiration of the term of 7 years, provided the annual premium should be duly paid on or before the 28th of *November* in each year. The plaintiffs then averred, that *at the time of the making of the said assurance, and from thence until the death of Mr. Pitt*, they were interested in his life to the amount of the sum insured; and that they duly paid the annual premium of 15*l.* 15*s.* before the 28th of *Nov.* 1804, and the further sum of 15*l.* 15*s.* before the 23th of *Nov.* 1805; and that after that day, *and while the assurance was in force and before the exhibiting the bill of the plaintiffs*, viz. on the 23d of *Feb.* 1806, Mr. *Pitt* died; that his demise was afterwards duly certified to the trustees, &c.; since when more than three months have elapsed before the commencement of this suit, &c.; but that the 500*l.* has not been *paid or made good* to the plaintiffs. There were also counts for so much money had and received by the defendants to the plaintiffs' use, and upon an account stated. To this the defendants pleaded, 1st, *nil debent*. 2dly, that the plaintiffs, at the time of making the assurance, and from thence until the death of Mr. *Pitt*, were not interested in his life in manner and form as they have complained, &c. 3dly, As to the first count, that the interest of the plaintiffs in the policy, and thereby intended to be covered, was a certain *debt* of 500*l.* at the time of making the policy, due from Mr. *Pitt*, to the plaintiffs, and no other: and that the said debt afterwards, and *after the death of Mr. Pitt*, and *before the exhibiting of the plaintiffs' bill*, to wit, on the 6th of *March* 1806, *was fully paid to the plaintiffs* by the Earl of *Catham* and the Lord Bishop of *Lincoln*, executors of the will of Mr. *Pitt*. Issues were taken on the two first pleas: and as to the last, the plaintiffs, protesting that their interest in the policy thereby intended to be covered was not the said debt mentioned in that plea to be due to them from Mr. *Pitt*, and no other: replied, that the said debt was not afterwards, and after the death of Mr. *Pitt*, and before the exhibiting of their bill, fully paid to them by the Earl of *Catham* and the Lord Bishop of *Lincoln*, executors of Mr. *Pitt*, in manner and form as alleged, &c.: on which also issue was joined.

The defendants paid 31*l.* (a) into court upon the first count: and on the trial of the cause before Lord *Ellepborough*, C. J. at *Guildhall*, it was agreed that a verdict should be entered on the several issues, according to the direction of the Court, on the following case reserved.

The policy mentioned in the declaration was duly executed, and the premiums thereon were regularly paid. Mr. *Pitt*, mentioned in the policy, died on the 23d of *January* 1806; which event was duly certified in *February* 1806 to the trustees of the Pelican Life Insurance Company. The defendants, before *Trinity* term last, were served with process issued in this cause on the 3d of *June* 1806. Mr. *Pitt* was indebted to the plaintiffs at the time of the execution of the policy, and from thence up to and at the time of his death above 500*l.*, and died insolvent. On the 6th of *March* 1806, the executors of Mr. *Pitt* paid to the plaintiffs out of the money granted by parliament for the payment of Mr. *Pitt's* debts, 1109*l.* 11*s.* 6*d.*, as in full for the debt due to them from Mr. *Pitt*. The case was argued in the last term by

(a) There was some discussion in the course of the argument as to the sufficiency of the sum paid into court, in respect of the premiums received; the grounds of computing which did not distinctly appear. The defendant's counsel, however, denied the necessity of paying any thing into court, the risk having once commenced; and ultimately no opinion was given by the Court on this point.

Dampier, for the plaintiffs, who contended that they were entitled to recover upon this policy, notwithstanding the payment of the debt to them by *Mr. Pitt's* executors out of the money granted by parliament for that purpose. It is clear, that a creditor has an insurable interest in the life of his debtor, and the amount of the debt is the measure of that interest; and so far the existence and legality of the debt(a) is necessary to the validity of the insurance in point of interest under the stat. 14 Geo. 3. c. 48.: but it is not the *debt qua debt*, which is insured, but the *life* of the debtor: it is only necessary that the interest should exist at the time of the insurance made, and continue up to the time of the death of the debtor, as it did in this case: and the sum insured having then become due, and the debtor's estate insolvent, the fact of payment of the debt afterwards by a third party cannot be material; such payment being altogether gratuitous. The validity of the insurance depends upon its agreement with the stat. 14 Geo. 3. c. 48., which was made to prevent "insurances on lives or other "events wherein the assured shall have no interest:" and for this purpose it enacts (s. 1.) "that no insurance shall be made by any persons on the life of any person, &c. wherein the persons for whose use, benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering:" and it avoids every assurance made contrary to the true intent and meaning thereof. The 2d section prohibits the making any policy on the life of any person, without inserting in it the person's name interested therein. And the 3d sect. provides, that "in all cases where the insured hath interest in such life, &c. no greater sum shall be recovered from "the insurers than the amount or value of the interest of the insured in such "life," &c. Now here it cannot be disputed but that all the requisites of the act have been complied with. The only question which can be made is upon the third section, as to the necessity of the interest continuing beyond the time of the event happening on which the insurance is stipulated to be paid to the commencement of the action. But the interest need only continue up to the happening of the event insured, when the cause of action arises; and that is the usual averment in action of this sort: and the defendants by their third plea admit that it continued beyond that time; for they allege that the debt was paid *after Mr. Pitt's* death, though before the action commenced. But if it had been necessary that the interest should endure up to the time of the action brought, that should have been averred; which has not been usual; and for want of which the judgments in former cases might have been arrested. The hazard was run, for which the premium was received, during *Mr. Pitt's* life; and as he died insolvent, there was then as it were a total loss; then the underwriters' liability cannot be adeemed by the voluntary payment of a third party, though through the hands of the debtor's executors. The very payment of the premium gave the plaintiffs an interest in the policy; and it could not have been in the contemplation of the Legislature when they granted the money for the payment of *Mr. Pitt's* debts to adeem the risk of underwriters. In the case of insurances against fire, it never was conceived that the insurers could avail themselves pro tanto of charitable donations collected for the benefit of the sufferers. In the case of a life insurance, the premium is not calculated upon the risk of the insolvency of the person whose life is insured, but solely on the probability of the duration of the life. But if the defendant's objection be well founded every case of this sort will be resolved into an examination of the assets of which the insurers will avail themselves pro tanto, after having had the benefit of the whole premium: and this too, at any distance of time when assets may be forthcoming after the payment of the loss. But, secondly, by the payment of

(a) *Dwyer v. Edie*, London Sitings after Hil. 1788. *Park on Insur.* 2d ed. 491, and 2 *Marsh on Insur.* 675.

money into court the defendants admit a continuance of the plaintiff's interest on the policy beyond the amount of the bare debt; for it was paid in after the liquidation of the debt, and after the action commenced. And therefore the plaintiffs would be entitled to recover something. And it does not appear how the premiums received have been reduced to the amount paid into court.

Marryat, contra, said, that he should not now dispute the proposition, that a creditor might insure the life of his debtor since the statute; though it might have been doubted at first, whether such an interest, as that in the life of another were within the contemplation of the Legislature. There was an inception of the risk on the policy; and therefore the premium was properly paid; and no question can arise on the amount of it; this being an insurance on a precise sum, like a valued sea policy. The only question is, whether in the event the plaintiffs have been damnified, and can call upon the assurers for any indemnification. To pursue the metaphor; the ship insured has been wrecked, but there has been a salvage, which the underwriters were entitled to, and out of which the assured have been indemnified: notwithstanding which they still claim as for a total loss; contrary to the very nature of the insurance, which is only a contract of indemnity. Admitting that the general form of the declaration in these cases may have been such as is stated: still it is competent for the underwriters to shew that a salvage has been received by the assured to the whole extent of their loss: and in no case can an assured recover double satisfaction, whether from the same or any other person; as in the case of a double insurance: and therefore it is immaterial in this case from what hand the first satisfaction came. This principle was fully admitted in the case of *Bird v. Randall*, 3 Bur. 1345. 1 Blac. 373. 387, where it was applied to a case much stronger than the present. For there a servant having entered into articles to serve his master for a certain time under a penalty, and the servant having left his service before the time by the procurement of the defendant, this Court, in an action by the master to recover damages against the seducer, held that the master's having before sued the servant and recovered the penalty against him before the action brought against the seducer (though in fact the penalty recovered was not received till after the second action commenced, but before trial,) was a bar to such further remedy; considering the amount of the penalty as ample compensation for the injury received; and that no further satisfaction could be received from any other quarter. [Lord *Ellenborough*, C. J. I never could entirely comprehend the ground on which that case proceeded. It was assumed that the sum taken as the penalty from the servant was the extreme limit of the injury sustained by the master; but there is the doubt: for the penalty might have been so limited, because of the inability of the servant to undertake to pay more; and yet it might have been very far from an adequate compensation to the master for the injury done to him by another who seduced his servant from him. I remember, however, a similar case tried at the sittings in the court of Common Pleas before Mr. Justice *Wilson*, sitting for the Chief Justice, who ruled the same point upon the dry authority of the former decision; but, as it seemed to me at the time, with considerable doubt upon his mind as to the propriety of it. *Laurence*, J. I suppose the Court proceeded upon the ground that the penalty was by the express stipulation of the parties made an equivalent for the loss of the service. Lord *Ellenborough*. That is so as between the parties themselves; but it may admit of doubt whether that were the fair way of considering it as against a stranger, a wrong doer.] A voluntary payment of another's debt, if accepted as such, will protect the debtor: and if so, it will equally protect an insurer, under the statute. For the object of that was to prevent wager policies: but if this policy may be enforced, notwithstanding payment of the debt, every creditor may gamble upon the life of

his debtor by way of insurance, though without any reason to doubt of his solvency; and upon his death he would be entitled to double satisfaction of his debt. If a payment out of the debtor's assets would have been a bar to this action, it cannot enter into the merits of the case to inquire by whose assistance the executors have been enabled to make payment. The money was paid by them, and received by the plaintiffs, as for the debt of Mr. Pitt. Then, 2dly, the payment of money into court on the first count only admits the contract declared on. It admits that the plaintiffs had an interest in the policy up to the death of Mr. Pitt, but not at the time of the action brought; and where a demand is illegal on the face of it, payment of money into court does not admit it^(a). [It was afterwards stated by the Court, and agreed on all hands, that the payment of money into court on the first count only admitted the facts stated in that count.]

Dampier, in reply, on the principal question, said, that the facts of the case shewed that this was not a wagering policy; but that the plaintiffs had an interest in it up to the extent of the sum insured. And denied that the subsequent payment of the debt out of the grant of parliament was like the case of salvage on a marine policy; for that was an advantage calculated upon by the underwriters in fixing the amount of the premium; but here the solvency of the debtor formed no basis of the calculation, but only the probable duration of his life. In *Bird v. Randall*, (besides the doubt of the soundness of that decision) the penalty was considered as liquidated damages to the full extent of the injury: and the judgment recovered was considered as a satisfaction in law. If in this case the plaintiffs, after recovering judgment against the underwriters, had attempted to sue Mr. Pitt's executors, the cases would have been more like. This stands as the case of a *gratuitous* payment by third persons of the debt of another, and not as the satisfaction of a legal demand, nor upon a stipulation to receive it as satisfaction of the present claim. It is most like the case of a charitable donation to sufferers by fire who were partially insured.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This was an action of debt on a policy of insurance on the life of the late Mr. Pitt, effected by the plaintiffs, who were creditors of Mr. Pitt, for the sum of 500*l*. The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. [His Lordship, after stating the pleadings and the case, proceeded—] This assurance, as every other to which the law gives effect, (with the exceptions only which are contained in the 2d and 3d sections of the stat. 19 Geo. 2. c. 27,) is in its nature a contract of *indemnity*, as distinguished from a contract by way of *gaming* or *wagering*. The interest which the plaintiffs had in the life of Mr. Pitt was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the stat. 14 Geo. 3. c. 48. s. 1. That interest depended upon the life of Mr. Pitt, in respect of the means, and of the probability, of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event, against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interests of these individuals assured in the loss of their debt. This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought: and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance fails. And it is no objection to

(a) *Cox v. Parry*, 1 Term Rep. 464, and *Ribbans v. Crickett*, 1 Bos. & Pull. 264.

this answer, that the fund out of which their debt was paid did not, (as was the case in the present instance,) originally belong to the executors, as a part of the assets of the deceased: for though it were derived to them *aliunde*, the debt of the testator was equally satisfied by them thereout: and the damnification of the creditors, in respect of which their action upon the assurance contract is also maintainable, was fully obviated before their action was brought. This is agreeably to the doctrine of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210. The words of Lord Mansfield are, "The plaintiff's demand is "for an *indemnity*: his action then must be founded upon the nature of the "damnification, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or perhaps "no loss at all." "Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for *indemnity*, where, upon the whole "no damage has been sustained." Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of *indemnity* at the time of the action brought, we are of opinion that a verdict must be entered for the defendant on the first and third pleas, notwithstanding the finding in favour of the plaintiff on the second plea(1)(2).

Harris v. James, one, &c.

9 East, 62. Nov. 25, 1807.

The certificate of a bankrupt, allowed after the filing of the plaintiff's bill, and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 G. 2. c. 30. s. 7, viz. that before the exhibiting the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt.

THE plaintiff filed his bill as of *Trinity* term 46 G. 3, in *assumpsit* on a promissory note, made and given on the 4th of *August* 1798, by the defendant to the plaintiff, for 71*l* 12*s*. 8*d*., with interest at 4 per cent. on demand. There were also the common money counts in the bill. To this the defendant pleaded in *Mich.* term last, that the plaintiff ought not to have or maintain his aforesaid action thereof against him; because he says, that after the making of the several promises in the declaration mentioned, and before the exhibiting the bill of the plaintiff, (to wit) on the 12th of *June* 1804, he, the defendant, became a bankrupt within the intent and meaning of the several statutes, &c.: and that the several causes of action in the declaration mentioned accrued before such time as he, the defendant, became a bankrupt: and concluded to the country. On which issue was joined. And at the trial at *Launceston*, before *Sutton*, B. a verdict was given for the plaintiff for 60*l*. 8*s*. 3*d*. subject to the opinion of this Court on the following case:

The plaintiff's bill was filed on the 5th of *September* last, as of the preceding *Trinity* term. The defendant pleaded the above plea on the 21st of *November* in *Michaelmas* term last. The defendant, at the trial, produced and proved his certificate, dated the 7th of *October* 1806, under the hands and seals of the commissioners named in a commission of bankrupt against him on the 12th of *June* 1804, by virtue of which he was in due manner declared a bankrupt on that day. The certificate was allowed by the Lord Chancellor on the 20th of *November* last.

(1) The principle of this decision has been recognized in the subsequent cases of *Bainbridge v. Nelson*, 10 East 344, and *Tuano v. Edwards*, 12 East 493.

(2) [See acc. *Blaupot v. Dacosta*, 1 Eden. 180. *Randall v. Cochran*, 1 Ves. 98. *Ex parte Andrews*, 2 Rose, 410. S. C. 1 Mad. 378.—W.]

Burrough for the plaintiff. The question is, Whether the bankrupt be entitled, under the circumstances, to the plea of bankruptcy in the general form given by the stat. 5 Geo. 2. c. 30. s. 7.: but the benefit of that defence is only given to a bankrupt who obtains his certificate before the action brought: it is given to him solely on the ground of his *conformity* to the statute; and for the purpose of entitling him to the certificate of such his conformity many things are required by the 10th section; which ought properly to have preceded the 7th in its place in the statute. The discovery of the bankrupt's estate and effects is to be of no avail, unless the major part of the commissioners certify, that he has made a full discovery and conformed himself in all things according to the directions of the act, and that they have no reason to doubt of the truth of the discovery: and such certificate must be signed by 4-5ths in number and value of the creditors for above 20*l.*, who have proved their debts under the commission; and the commissioners must have proof by affidavit of such signing, &c.; which affidavit, &c. must be laid before the Lord Chancellor with the certificate: and the bankrupt must also make oath that the certificate and consent of the creditors were obtained without fraud: and then the certificate must be allowed by the Lord Chancellor: and after all, any of the creditors may be heard against it. All these, things ought to be completed before the action brought; for how else can the certificate be pleaded in bar of the action, as in this case? If the plaintiff had a complete cause of action at the time of commencing his suit, and the defendant at that time had no defence, it is contrary to justice and legal analogy that any matter arising *ex post facto* should be a bar to the action. The only instance to the contrary is in the case of executors who may plead judgments confessed by them after the action brought in bar of it; but there the *fund* is sued, and not the party (a). And though in *Sullivan v. Montague*, Dougl. 106, and *Reynolds v. Beerling* (b), it was considered that *actio non*, &c. went to the time of plea pleaded, and not to the commencement of the action: yet that was afterwards over-ruled in *Evans v. Prosser*, 3 Term Rep. 186. But the wording of the 7th section, which gives the plea, shews plainly that the full bar to the action was only meant to be given in this case where the certificate was obtained before the action brought; because after discharging the bankrupt, who shall in all things have conformed to the act, from all debts due at the time he became bankrupt; (and till the certificate obtained and allowed it cannot be told whether he have so conformed or not;) it proceeds, "and in "case any such bankrupt (that is, one who has so conformed) shall *afterwards* "be arrested, prosecuted, or impleaded for any debt due before such time "as he became bankrupt, he shall be discharged upon common bail; and "shall and may plead in general that the cause, of such action did accrue "before such time as he became bankrupt," &c. and then it makes the "certificate and allowance evidence of the bankruptcy, &c. It is clear, that the general plea is only given in cases where the action commenced *after the bankruptcy*, *Tower v. Cameron*, 6 East, 413, but the word *afterwards* applies as well to the *conformity of such bankrupt as to his bankruptcy*. And in *Langmead v. Beard*, at the *Middlesex* sittings after Mich. term 1792, Lord *Kenyon*, C. J. held that a certificate granted after plea pleaded, but before the trial, would not avail at law. The words are "afterwards arrested, prosecuted, or impleaded:" but *impleaded*, which is the most general word, must mean the original impleading in the action. The only object of the Legislature in giving the general plea was to avoid the expence and prolixity of pleading all the special matter, which before that act a bankrupt who sought to avail himself of his certificate was obliged to do, in answer to an action by a creditor whose debt accrued before the commission:

(a) *Vide Le Bret v. Papillon*, 4 East, 507, 8.

(b) *M. 25 G. 3. B. R. ib. 116. 2d edit. and 3 Term Rep. 188, n.*

viz. the trading, act of bankruptcy, petitioning creditor's debt, the commission, and all other the previous proceedings requisite by the 10th section to a valid certificate : but it never meant to give a different defence from what the bankrupt had before, or to give a more extended legal effect to the general than to the special form of pleading. Then, as in order to constitute a legal bar to the action all the matter necessary to constitute a legal defence, if pleaded specially, must have been alleged to have occurred before the action brought : so under this general form of pleading, the certificate necessary to substantiate it at the trial ought to be shewn to have existed antecedent to the action. [Lawrence, J. There is no clause which says that the certificate shall be pleaded in bar to the action : it is the conformity to the statutes which give discharge, of which the certificate is only the evidence. The statute only says, that " in case any *such* bankrupt (that is, who shall have conformed in all things, as stated in the preceding part of the clause) shall be arrested, &c. for any debt due before his bankruptcy, he shall be discharged on filing common bail, &c. and then it gives the general bar. The 10th section merely states the evidence of the conformity. Lord *Ellenborough*, C. J. Supposing no general plea had been given, the question would still have been the same, whether the conformity did not give the discharge ? The latter part of the clause only gives a compendious form of pleading to the discharge.] No other evidence of conformity than the certificate could be admitted : it was therefore intended to be of the substance of the discharge ; and must have been specifically alleged in pleading, but for the general form allowed ; and if it did not exist before the action brought, it could not by the general rule of law have been pleaded as a bar to the action, but only as a bar after the last continuance, or after the action commenced.

Dampier, contra. The bankruptcy of the party after the debt accrued, and his subsequent conformity, constitute the substantial defence to the action given by the statute : but the Legislature has required certain evidence of that conformity, which, if obtained any time before the trial, and ready to be produced then, is sufficient. The necessity of conformity is stated in the 1st section, and is enforced by the penalty of death : the conformity therefore precedes the other steps to be taken. Then the 7th section says, that every bankrupt who shall conform as by the act is directed, shall be *discharged* from all debts *due or owing at the time he became bankrupt* : and then, after giving the general plea, it says, that the *certificate* and allowance shall be sufficient *evidence* of the trading, bankruptcy, commission, and *other proceedings precedent to the obtaining such certificate*. It is plain, therefore, that the conformity is the defence, and the certificate is merely evidence of the prior proceedings. The 10th section no otherwise applies to this subject than as it shews what guards the Legislature have thrown about the obtaining the certificate, which is to be evidence of such conformity, in order to prevent fraud. An argument arises upon the common form of the certificate, which concludes with stating that the bankrupt finished his examination ; and not with the allowance of the certificate ; which in fact forms no part of the conformity. If no general plea had been given, it would have been sufficient to have stated the trading; bankruptcy, &c. examination and the conformity ; and it would not have been necessary to have stated the allowance of the Lord Chancellor. Great inconvenience and oppression would ensue if a bankrupt were liable to the costs of all the actions which might be commenced against him after the commission issued, which certainly could not have been intended by the Legislature, while they were taking all his property from him. There is another exception to the general rule, besides the case of executors, where matter arising after the action brought is pleadable in bar of it ; namely, the outlawry of the plaintiff ; as in *Moore v. Green(a)*. But in no event could this have been

(a) Salk. 178. But see for the general rule, *Le Bret v. Papillon*, 4 East, 502.

pleaded as a plea *puis darrein continuance*, because no continuance had in fact intervened between the bill filed and the plea; Thel. Dig. b. 14. c. 3. s. 10. It could only be pleaded as an original plea in bar; as in *Price v. Kenrick*, Fort. 338, in the case of a release after the action brought. [Lord *Ellenborough*, C. J. observed, that the case of a general release did not apply, as that might release the costs incurred after the action brought, as well as what happened before.]

Burrough, in answer to the case of outlawry, said, that the plea went to the very cause of action, which devastated the plaintiff of his property and right to sue, and transferred them to the crown. As to the principal question, he argued that the certificate was so much of the substance of the defence, that if pleaded specially, the plaintiff might have traversed its existence, or replied *per fraudem*, or any of the circumstances mentioned in the 12th section which go to invalidate the certificate; but the Legislature would hardly have made so many distinct provisions for invalidating the effect of mere evidence. Again, if the certificate were merely evidence, the Lord Chancellor by his order, or this Court by *mandamus*, would, upon sufficient proof of the conformity, compel the commissioners to certify it: but such applications have always been refused(a); as being a matter entirely within the discretion and judgment of the commissioners. The justice of the case is also with the plaintiff, who by this form of pleading will be debarred of his costs by matter arising after his action was well brought: whereas by another form of pleading, viz. that pending the action the certificate was granted, and therefore that the plaintiff ought not *further* to proceed in his action, the defendant will still have the benefit which the certificate was meant to give, that of protecting him from the payment of the debt, but not of the costs before incurred.

This case was argued in the last term, and stood over for consideration till now, when

Lord *Ellenborough*, C. J. delivered the opinion of the Court.—This was an action of *assumpsit*, to which the defendant had pleaded his bankruptcy, in the form prescribed by the stat. 5 Geo. 2. c. 30. s. 7. The facts were, that the plaintiff's bill was filed against the defendant, an attorney, on the 6th of last September as of the preceding *Trinity* term. The defendant pleaded the above plea of bankruptcy on the 21st of November in *Michaelmas* term last: and at the trial produced and proved his certificate, dated the 7th of October 1806, under the commission of bankrupt, issued against him on the 12th of June 1804, and under which he was duly declared a bankrupt on the 12th of June 1804. The certificate was allowed by the Lord Chancellor on the 20th of November last, the day before the plea was pleaded. It was contended on the part of the plaintiff, that the matter of the defendant's discharge, having arisen after the filing of the plaintiff's bill, should have been pleaded as a plea after the last continuance. To which it was, on the part of the defendant, answered, that if even the matter of the discharge grew by the allowance of the certificate, and was not merely to be proved in evidence by it; yet that even so; and if the allowance of the certificate were specially pleaded; it could not be pleaded in terms as a plea *after the last continuance*, inasmuch as no continuance had in fact intervened between the time of the bill filed and of the plea pleaded. It was further argued, on the part of the plaintiff, that this plea, and the general bar arising out of it, was only given by the statute in favour of persons conforming to the directions of the statute, who should "*afterwards* (that is, after they had so conformed) be arrested, prosecuted, or impleaded, for any debt due before such time as he, she, or they might be "*come bankrupt*:" and it was contended, that the word "*afterwards*," by reference to the antecedent matter, applied only to cases in which the action was commenced after the bankrupt had *already conformed*, and obtained his certi-

(a) Vide *Ex parte John King*, 7 East, 92.

ificate in proof of such his conformity. But it appears to us, on reference to the different provisions of the act, to have been the object of it, that every bankrupt who had obtained his certificate of conformity, and which had been duly allowed, should be thereupon, (that is, upon pleading such plea, and producing such his certificate) "*discharged from all his debts due or owing at the time that he did become bankrupt,*" for which he should have been impleaded after his bankruptcy; and that the discharge given him was meant to be a bar to all remedy by suit against him, commenced after his bankruptcy for debts due antecedent to his bankruptcy. The form of the plea given by the statute accords with this supposed intention and object of the Legislature, inasmuch as it alleges merely "that the cause of such action accrued before the time he became a bankrupt." This supposed intention of the Legislature in favour of the bankrupt, in part inferred from the language of the 7th section, is however further confirmed by adverting to the provisions contained in the 13th section: for by that section, a bankrupt having obtained his certificate, duly allowed, is, *if taken in execution for any debt due before his bankruptcy*, by reason that *judgment was obtained before his certificate was allowed*, entitled to be discharged out of execution, (i. e. generally as to *both debt and costs*) upon the production of his certificate before a judge. Whereas upon the principle contended for on the part of the plaintiff, the Legislature could only have consistently directed his discharge out of execution as to the *principal debt*; leaving him still liable for the *costs* of the action, at least for so much of them as had been incurred between the bringing of the action and the time of obtaining his certificate. Another argument in favour of the defendant arises from the 13th section providing only for the relief of the bankrupt whose certificate shall be obtained *after* judgment; so that a bankrupt who shall obtain his certificate, after action brought and *before* judgment, would have no advantage of such certificate, if the construction contended for by the plaintiff's counsel were to prevail. But we cannot suppose, that it was the intention of the Legislature, that the certificate of a bankrupt should prevent his creditor recovering against him if his certificate were obtained before the commencement of the action; or having personal execution against him, if obtained after the judgment; and that he should still remain liable to his debts, if he obtained his certificate after the commencement of the action, and before judgment. As we see no possible reason for such a distinction being intended, we think that the intention of the Legislature, as collected from the act, must be taken to be, that the bankrupt should be discharged wholly from debt and costs, if he obtained his certificate in time to plead it in bar of the action: and that as nothing is provided to the contrary, that such bar should have the usual effect of entitling the defendant, upon its being found for him, to his costs. And that if he obtained his certificate after judgment, and too late to plead it, that it should still be available for his discharge out of execution for the debt and costs: so that in neither case the defendant should be subject to costs: but that if he obtained his certificate in time to support his plea, his plea should have the common effect of all other pleas in bar which are found for a defendant.

Judgment for the defendant.

Roberts, one, &c. v. Camden.

9 East, 93. Nov. 25, 1807.

The rule of construction as to slanderous words is to construe them in their plain and popular sense, such in which an ordinary hearer would have understood them at the time they were spoken. And therefore the defendant saying of the plaintiff, that he was "*under a charge of a prosecution for perjury*"; and that *G. W.* (an attorney of that name) had "*the Attorney-General's* directions to prosecute the plaintiff *for perjury*," is actionable. For after verdict (by which the jury who are to judge of the intent of the speaker, must be taken to have *negatived* that he meant to speak of a prosecution for a perjury which the plaintiff had *not* committed,) the words, not having been justified, must be taken to be *false*; and being unqualified by any contract, and unexplained by any occasion to warrant them, the law infers *malice* from the *falsehood* of an accusation which, in the common acceptance of the words, impute *perjury* to the plaintiff.

Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to support it, is not necessary to sustain the action, it may be rejected as *surplage*. And therefore an innuendo, that the *Attorney-General* spoken of meant the *Attorney-General* for the county palatine of *Chester*, was so rejected.

IN an action on the case for slander, the plaintiff, after stating by way of introduction, that at the time of the slanderous words spoken, he was a practising attorney of the Court of Great Sessions for the county of *Flint*, and had conducted himself with integrity, &c. declared in the third count, that the defendant *intending to injure and aggrieve* the plaintiff in his *good name*, character, &c. *and profession*, and to *cause it to be believed that the plaintiff was guilty of perjury*, and that a *prosecution for the crime of perjury was about to be commenced against him*, afterwards, &c. in a certain discourse, &c. falsely and maliciously, &c. said and published these false, scandalous, and malicious words following, of and concerning the plaintiff, *viz.* "He (meaning the plaintiff) is under a charge of a prosecution for perjury. *G. Williams* (meaning one *G. W.* an attorney) had the *Attorney-General's* directions meaning the directions of his Majesty's *Attorney-General* for the county palatine of *Chester* to prosecute (meaning to prosecute the plaintiff) for perjury. By reason whereof the plaintiff was injured and prejudiced in his good name, &c. and profession, and lost great gains which he would otherwise have acquired by his profession of an attorney." There was a 4th count for a written libel.

After a general verdict with joint damages on the whole declaration, *Burrough* moved in last *Trinity* term, in arrest of judgment, and afterwards argued the case, together with *Topping*, for the defendant; and the *Attorney-General* and *Scarlett* were heard against the rule for arresting the judgment. The cases cited for the plaintiff, to shew that the words were in themselves actionable, were *Haley v. Stanton*, *W. Jones*, 299, and *Cro. Car.* 268. *Heynes v. Sprot*, *Cro. Jac.* 247. *Showell v. Hayman*, *ib.* 154. *Gainford v. Tuke*, *ib.* 536. And his counsel contended, that at any rate, if the third count were bad, the Court would not arrest the judgment, but only award a *venire de novo* to have the damages severed by another jury. On the other hand were cited *Holt v. Scholesfield*, 6 Term Rep. 691. *Steward v. Bishop*, *Hob.* 177. *Powell v. Wind*, *ib.* 305, 327. *Bayly v. Churington*, *Cro. Eliz.* 279. *Weaver v. Cariden*, 4 Rep. 16, to shew that the words were not actionable, as not conveying any opinion of the speaker upon the truth of the charge. And the innuendo, as to the *Attorney-General* of *Chester*, was objected to as not warranted by any antecedent colloquium. This case stood over for consideration till this term; when

Lord ELLENBOROUGH, C. J. delivered judgment.

This was a motion in arrest of judgment in an action for words, in which a general verdict was found, with joint damages upon the whole of the decla-

ration. One of the counts, (the 8d) which it contained, has been argued on the part of the defendant to be bad on two grounds; 1st, that the words therein stated are not actionable, as not imputing to the plaintiff with sufficient certainty the crime they point at, namely, that of perjury; and 2dly, because as there is no colloquium respecting the Attorney-General of *Chester*, the innuendo, stating that "the Attorney-General" meant the Attorney-General for that county, vitiates the count, as being introductive of new matter. But we think that there is nothing in this last objection; for admitting most clearly, that new matter cannot be introduced by an innuendo, but that it must be brought upon the record in another way, when necessary to support the action⁽¹⁾; yet where such new matter is not, as here, necessary to support the action, an innuendo, without any colloquium, may well be rejected as surplusage; as it can have no effect in enlarging the sense of the words used. If then the innuendo be struck out of this count; as for the reason above given we think it may; the foundation of the second objection is removed. The first objection turns upon the meaning of the words spoken of the plaintiff by the defendant. The words are these; "He is under a charge of a prosecution for perjury. *Griffin Williams* (meaning an attorney of that name) has the Attorney-General's directions, (meaning the Attorney-General of the county palatine of *Chester*) to prosecute (meaning to prosecute the plaintiff) for perjury." As it has been settled ever since the case of *Underwood v. Parkes*, 2 Stra. 1200, that the truth of the words cannot be given in evidence upon not guilty, but must be specially pleaded; the words, not having been so justified, must be assumed to be false; and the words not being accompanied by any qualifying context, not appearing to be spoken on any warrantable occasion; as in a course of duty, or the like; so as to rebut the malice which is necessarily to be inferred from making a false charge of this kind; provided the charge itself is to be considered as a charge of the crime of perjury; the question amounts simply to this, whether the words amount to such charge; that is, whether they are calculated to convey to the mind of an ordinary hearer an imputation upon the plaintiff of the crime of perjury. The rule which at one time prevailed, that words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them. What then is the plain and popular sense of these words; and what is the imputation meant to be conveyed by a person speaking them *untruly* of another? They must mean, that he was ordered by the Attorney-General to be prosecuted; (and it is immaterial for this purpose, whether the Attorney-General of the county palatine, or of *England*, were meant;) either for a perjury which he had committed; or which he had not committed; or, which he was supposed only to have committed. In the first sense they are clearly actionable. In the second they cannot possibly be understood consistently with the context. And if the defendant had used the words in the last sense, the jury might have acquitted him, according to the doctrine in the case of *Oldham v. Peake*, both in the court of Common Pleas, 2 Sir W. Blackstone, 962, and in this court, Cowp. 278; in which case, when in the Common Pleas Mr. Justice Gould laid it down, "that what was the defendant's meaning was a fact for the jury to decide upon." And Lord Mansfield afterwards, when that case was brought into this court, by error, said, "if (the words had been) shewn to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid." And certainly, if the sense of the defendant, in speaking these words, had varied from that ascribed to them by the plaintiff,

(1) Vide *Van Pelt v. Hopkins*, 5 Johns. 211. *Thomas v. Cresswell*, 7 Johns. 264. 271, 2. *Lindsey v. Smith*, 7 Johns. 359. 1 Chitty on Plead. 593.

he might by specially pleading have shewn them not actionable, had he not chosen to have rested his defence merely on the general issue. It appears therefore that these words must fairly be understood in the first of these three senses; namely, that he was ordered to be prosecuted for a perjury which he had committed; and, so understood, they are unquestionably actionable. These words are not less strong in effect than the words which were held actionable in one of the latter cases, that of *Carpenter v. Tarrant*, Rep. temp. Hardw. 339. viz. "*Robert Carpenter was in Winchester gaol, and tried for his life; and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A., and stealing his bacon.*" And without adverting to the long bead roll of conflicting cases which have been cited on both sides in the course of this argument, it is sufficient to say, that these words, fairly and naturally construed, appear to us to have been meant, and to be calculated, to convey the imputation of perjury actually committed by the person of whom they are spoken; and that, therefore the rule nisi for arresting the judgment must be discharged.

The King v. the Inhabitants of Bradford.

9 East, 97. Nov. 25, 1807.

By the stat. 35 G. 3. c. 101. s. 2. the party aggrieved by an order of justices, directing payment to the amount of above 20l. of the charges and costs of the suspension of an order of removal, on account of the illness of the pauper, may appeal to the next sessions, in like manner as against an order of removal, though he omit to give notice of such his appeal within three days after the demand of such charges and costs; by which he makes himself liable to a distress for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the surplus, if before levied by distress, must be refunded.

AN order was made on the 7th of July 1807, by two justices of the peace for the county of Wilts, for the removal of Sarah Spire, a pauper, from Bradford to Melksham in the same county; and the justices at the same time made another order suspending the execution of the first, by reason of the sickness and infirmity of the pauper, pursuant to the stat. 35 Geo. 3. c. 101. s. 2.; and on the 16th of Sept. following, they made a third order, directing the first order to be executed, and the sum of 44l. 14s. 9d., expence which had been incurred by the suspension of it, to be paid by Melksham parish to Bradford. On the 17th of Sept. the pauper was carried to Melksham, and delivered to the parish officers there; and on the 1st of Oct. a notice of appeal was given by Melksham to Bradford; and a motion was made at the Michaelmas sessions following to enter and adjourn an appeal against the last order for the payment of the expences incurred by the suspension of the order of removal, under the before mentioned statute; which was agreed to by the Court; but they stated these facts specially, and reserved the question for the opinion of this Court, whether by the stat. 35 Geo. 3. c. 101. s. 2. any appeal were allowed to the quarter sessions, the appellants not having given notice of appeal within three days after the removal of the pauper to the respondent parish, as mentioned in that clause of the act: or whether the appellants were not concluded by their neglecting to give such notice from afterwards entering and prosecuting their appeal.

Casberd, in support of the jurisdiction of the sessions to hear the appeal, notwithstanding the want of notice within three days after the removal of the pauper, was stopped by the Court, who intimated that the words of the second clause giving the same power of appeal, as against an order of removal, were conclusive on the question.

W. Williams, contra, relied on the prior words of the clause, which directs that in case the parish officers to whom an order of removal has been

directed, which had been suspended, and certain charges incurred in consequence of such suspension, "shall, upon the removal or death of such poor person ordered to be removed, refuse or neglect to pay the said charges *"within three days* after demand thereof, and shall not *within the same time* give notice of appeal, *as is hereinafter mentioned,*" it shall be lawful for a justice of the peace to grant a warrant of distress to levy the charges and costs. It is true, that the clause goes on to say, that if the charges and costs exceed 20*l.*, the parties aggrieved by such order "may appeal to the next sessions against the same, *as they may do against an order for the removal of poor persons by any law now in being:*" but it never could have been intended that the appeal should be made after the charges had been actually levied by distress, when it before required notice of appeal *as thereinafter mentioned* to be given *within three days* after the demand made; but the subsequent general words must be construed with reference to the prior restriction as to the time of giving notice of appeal: and it must be understood altogether as directing, that if notice of appeal be given within the three days after the demand, and the sum exceed 20*l.*, then the parties aggrieved may appeal against it, as they might do against an order of removal. The words, *as hereinafter mentioned*, are nugatory, unless the proviso giving the appeal be connected with the antecedent notice of appeal, which is required to be given within three days. Besides, the clause goes on to direct, that if the Sessions, on the appeal, be of opinion that a less charge ought to have been paid, they are to amend the order, and direct that the amended order shall be *carried into execution* by the justices by whom the original order was made, &c. This again shews that the Legislature did not contemplate that there was to be any appeal after the original order had been already executed, and the larger sum levied by distress for want of the notice of appeal within three days after the demand: nor has it made any provision for ordering the surplus levied on such distress, beyond the reduced sum directed to be levied by the Sessions, to be refunded.

LORD ELLENBOROUGH, C. J. The only consequence to be deduced from the words of the clause, from the not giving notice of appeal against the charges within three days after the demand of them, is, that the party not giving such notice within the time subjects himself to the inconvenience of a distress. But the subsequent proviso giving the appeal is conceived in the most general terms, that the parties aggrieved may appeal to the next sessions against such order as they may do against an order of removal by any law in being. And it is not disputed but that the present appeal was duly made, if it is to be regulated by the rules which govern appeals against orders of removal. But it is said, that by reason of the antecedent words, "*as hereinafter mentioned,*" referring to the appeal given by the latter part of the clause, we ought to import into that latter part words of reference to the former: but that would be to alter, and not to interpret the clause as it now stands; the meaning of which appears plainly to be this; if the party aggrieved by the order, and intending to appeal against the amount of the charges, will give notice of appeal within three days after demand made, he shall be relieved from the inconvenience of a distress; but though he neglect to do so, he only subjects himself to that inconvenience: but his right of appeal, which is afterwards given, is not thereby taken away: and if he afterwards think proper to appeal within the time allowed by law for appeals against orders of removal, he is expressly empowered to do so. Then if the order should be wholly quashed or the sum to be paid be reduced upon the appeal, no injustice will follow: for it is a consequence of law that the money paid upon an order which was afterwards vacated in whole or in part should be refunded by those who have received it; and if it were not repaid, an action for money had and received would lie to recover it back again,

Per Curiam,

Order of Sessions confirmed.

The King v. the Inhabitants of Everdon.

9 East, 101. Nov. 25, 1807.

Under the stat. 35 G. 3. c. 101. s. 2, an order of justices suspending their order made for the removal of a pauper to his place of settlement, on account of sickness, may be made, tho' he were not *brought before the Justices*, at the time of such orders made: the plain intent and precise object of the statute being to extend the power of suspension to all cases where orders of removal may be made; and orders of removal may be made though the paupers to be removed be not brought personally before the magistrates; however fit that is to be done where it may be done.

AN order was made by two justices of the peace on the 19th of *June* 1805, for the removal of *Sarah Ares*, a pauper, from *Everdon* to *Wappenham*, both parishes in the county of *Northampton*: and at the same time, the justices made another order by virtue of the stat. 35 Geo. 3. c. 101. s. 2, to suspend the execution of the first, on account of the sickness and infirmity of the pauper, until it should be made appear to them that it could be safely executed; and by a subsequent order of the 3d of *December* 1806, reciting the death of the pauper, and that 20*l.* 8*s.* 6*d.* expence had been incurred by the suspension of the order of removal, the same magistrates directed the parish officers of *Wappenham* to pay that sum to *Everdon* on demand. Against this last order an appeal was lodged at the ensuing sessions, when the order was quashed, subject to the opinion of this Court upon a case stating, That the order for the removal of the pauper was made upon the examination of her father only, who swore that the pauper from excessive infirmity and sickness was unable to be brought before the justices who made the original order for examination; and that the said justices at the same time made the order for suspension. That on the 3d of *Nov.* 1806, the pauper died at *Everdon* without ever having been removed to *Wappenham*; and that the same justices afterwards made the order in question for the payment of the 20*l.* 8*s.* 6*d.* charges. And that it was proved on the hearing of the appeal that the pauper was not present before, or examined by, the said justices, when they made the order for the suspension of the order of removal, nor was she ever before them at all upon the business, The Sessions being of opinion that the justices had not power to grant the order of suspension without having the pauper before them to be examined, or without the justices visiting the pauper themselves, therefore quashed the order for the payment of the money founded thereon.

Dayrell, in support of the order of Sessions, relied upon the words of the stat. 35 Geo. 3. c. 101., the 2d section of which, giving the justices jurisdiction to suspend an order of removal made by them, on account of the sickness, &c. of the pauper, is expressly confined to cases where the pauper is *brought before the Justices* for the purpose of being removed. And he also argued, that the strict construction of the words was required by the evident meaning of the Legislature to submit the pauper to the view of the magistrates, so that they might judge from the evidence of their own senses, as well as from other sources of information, whether he were in a fit condition to be removed; for how else can it appear to them that he is unable to travel, &c.? Before this act the parish officers had a discretionary power of executing an order of removal when they thought proper; and the Legislature by this act intended to vest that personal discretion in the magistrates.

Morice and *Sainbridge*, contra. This is a remedial law, the object of which will be entirely frustrated by a literal construction of the words of it. For on the one hand, it would be very inconvenient and burthensome to require that, if the pauper cannot be brought to the place where the justices meet, by reason of sickness or infirmity, they should go to the place where the pauper is;

and that, however dangerous it might be to them in case of contagious disorders : or on the other hand, that the pauper must be brought before them, however unable to be removed without hazard of his life : which would defeat the very end of this humane regulation. The act could never be put in force except in slight cases of illness. Neither can it answer any useful purpose, in most cases, to require this personal inspection of the magistrates : for unless they happened to be medical men, the mere view of the pauper could not afford them so much information, as to the real state of his health, as the evidence of medical persons. And there might be as much danger to the pauper himself in bringing him to the place where the justices meet, as to the place of his settlement. It clearly is not necessary, according to *Rex v. Bagworth*, Cald. 181, that the pauper should be present and examined for the purpose of founding an order of removal ; though if it be convenient, it is fit and proper to be done. In some cases, such as infancy and lunacy, it would be useless to do so. Where a literal construction of an act would go beside the plain meaning and intent of it, there are several instances in the poor laws of a still greater departure from the letter, in aid of the spirit of an act, than that now proposed. The stat. 5 Eliz. c. 4, requires the binding of an apprentice for seven years ; and the 44th section avoids all indentures, &c. of apprenticeship made otherwise than according to that law : yet it has been holden, *Rex v. St. Nicholas*, in *Ipswich*, Burr. S. S. 91, that indentures for a less time are voidable only as between the parties. So the stat. 3 W. & M. c. 11. s. 7, says, that "any unmarried person, not having child or children," may gain a settlement by hiring and service for a year : and yet a widower having children who have gained settlements in their own right has been deemed competent to gain a settlement, *Antony v. Cardenham*, Fort. 309, Foley, 131, because within the reason, though certainly not within the words of the law. So in *Rex v. Islington*, 1 East's Rep. 283, the 4th section of the act in question, which provides that no person who shall come into any parish shall gain a settlement by being rated to any tenement under 10l. a year value, was held to extend to persons who were in the parish at the time of passing the act. In order therefore to put a reasonable and practicable construction upon the words, "in case any poor person shall be brought before any justices of the peace for the purpose of being removed," &c. they must be construed to apply to the bringing the case of a pauper judicially before the magistrates for that purpose.

LORD ELLENBOROUGH, C. J. I hope that the apparent justice of the one construction, and the great and manifest inconvenience of the other, do not too much warp my mind in coming to the conclusion which I have done : for it would indeed be a grievous construction if we were bound to adopt the literal sense of the words of the statute which have been commented on. But I hope we shall do no violence to the words, and I am sure we shall not violate the spirit of the act, by construing the words, "in case any poor person shall from henceforth be brought before any justice or justices of the peace for the purpose of being removed," to mean, in case a question concerning the removal of any poor person, or if the case of any poor person, shall be brought before the justices of the peace for the purpose of his removal, &c. The language of the act adverts to the case which most generally happens, where the pauper is brought in person before the magistrates to be examined as to his settlement ; but that is not necessary to be done in all cases, as appears from what is said by Mr. Justice Buller in *The King v. Bagworth*, who denied that there was any such general rule, as that it was necessary for the pauper to be examined : and he instanced the case of infants of tender years, where it is plainly impossible. And he referred to a case from Comberbach, 478. where Lord Holt said, that "if it can be, it is fit it should be so, but not absolutely necessary." And as it would be useless in cases of infancy or lunacy, so it might be dangerous to the magistrates themselves, in the case of in-

feetious disorders, to go to the pauper to take his examination in person : and to bring him before the magistrates would be, in cases of extreme sickness or infirmity, to expose him to the very mischief which the act was intended to remedy. All therefore that the act meant was, not that where any pauper was brought personally, but where his case was brought judicially before the magistrates, for the purpose of his removal, that they should have power to suspend the execution of the order of removal, if it appeared to them, that is, by due examination of the facts, that from sickness or infirmity of the party the removal could not then safely be made. This is the plain sense and spirit of the act, though somewhat straining upon the words of it : but no other construction can be put upon them consistently with the general object of the act. And in doing this, we do not go further against the letter of the act than was done, in the case referred to of *Antony v. Cardenham* ; where the description of a person, *not having any child*, was construed to mean not having any child which could be a burden to the parish where the father was hired and served.

GEORGE, J. The letter of the statute is sufficiently plain according to the common understanding of the words : but that would militate so strongly against the spirit and object of it, that we cannot be governed by the letter without entirely defeating this very wholesome law. In many cases where it might be necessary to ascertain the settlement of a poor person, the removal of him from a sick bed to be carried before the magistrates for that purpose might even occasion his death ; when it was the professed object of the law to guard against any risk of his personal safety, by enabling the justices to suspend the execution of the order of removal till it could be done without danger to the party.

LAWRENCE, J. The drawer of the act probably conceived that a poor person was always carried before the magistrates at the time of the order of removal made ; it is usual indeed so to do ; but it is not necessary, as appears from the cases which have been cited. But having assumed that to be the constant practice, then the object of the provision was, that in *all* cases of orders of removal made, the magistrates should exercise their discretion whether the paupers were in a fit condition to be removed at the time without danger to them ; and if not to enable the magistrates to suspend the execution of the order till they were satisfied that it might safely be executed. The letter of the act to be sure is confined to the case of any poor person *brought before* the magistrates for the purpose of being removed ; but so to construe the act would be to draw poor persons in many instances from the bed of sickness ; and in case of dangerous accidents happening at a distance from the place where the magistrates met, to prevent them from having the benefit of the act at the very time when they stood most in need of it. By construing, therefore, the act in the way we now do, we give effect to the plain intention of it, though the words used are not the most apt to express that intention.

LE BLANC, J. I agree with the rest of the Court in the construction they have put upon the act : for a contrary construction would give effect to the letter by the repeal of the very object of the statute : Though I cannot agree, that every case where a construction has been put upon a statute, in some instances directly contrary to the words of it, is a fit precedent to be followed by us. In the present case, it is quite clear what the object of the Legislature was. Poor persons were before this act liable to be removed on being only *likely to become chargeable* : that provision was repealed, and they were only subject to be removed upon becoming *actually chargeable*. But it was foreseen that the very circumstance which would most probably render them chargeable was sickness : therefore when the Legislature authorized their removal when actually chargeable, it guarded against the improper exercise of it in case of sickness, or other infirmity, by enabling the magistrates to suspend the execution of the order of removal, under such circumstances, till

they were of opinion that it could be safely executed. Then this intention of the Legislature would be entirely defeated, if we were to hold that in the very instances to which they looked as improper for poor persons to be removed, and in which they authorized the magistrates to suspend the execution of the order, the parties should not have the benefit of the provision unless they were brought before the magistrates.

Order of Sessions quashed.

The King v. The Commissioners of Sewers for the county of Somerset.

9 East, 109. Nov. 26, 1807.

The stat. 23 H. 8. c. 5. s. 17, having directed that "*Laws, acts, decrees, and ordinances*" made by commissioners of sewers shall stand good and be put in execution *so long time as their commission endureth, and no longer*, except "*the said laws and ordinances*" be engrossed in parchment, and certified under the seals of the commissioners into Chancery, and have the Royal assent: and the stat. 18 Eliz. c. 9, having directed all commissions of sewers to continue in force for 10 years, unless sooner determined by supersedeas or any new commission; and that all "*Laws, ordinances and constitutions*," made by force of such commission, *being written in parchment, indented, and under seals, &c.* shall, without such certificate, or Royal assent, continue in force notwithstanding the determination of the commission by supersedeas, until repealed or altered by new commissioners; and that all such *Laws, ordinances, and constitutions, written in parchment, indented, and sealed, &c.* shall, without certificate or Royal assent, continue in force for one year, after the expiration of such commission by lapse of 10 years from its teste: held,

1. That the *Laws, acts, decrees and ordinances*, mentioned in the stat. of Hen. 8. mean the same as the *Laws, ordinances and constitutions*, mentioned in that of Elizabeth. And,
2. That a decree made by commissioners, under a former commission which had expired by lapse of 10 years, directing a sea wall to be refounded, which had been destroyed by a violent tempest and inundation, and the sums necessary for its construction to be advanced by those who were bound to sustain it *ratione tenuræ*, (and who did advance the money accordingly,) and that a rate should be made on the Level for their reimbursement; (although such decree had been written in *parchment, indented, and sealed*; which this was not,) could not be enforced by commissioners under a new commission, issued more than a year after the expiration of the former commission; as to so much of it as remained unexecuted; though good to the extent to which it had been executed: and therefore this Court refused a *mandamus* to the new commissioners to direct a rate to be levied on the Level for the reimbursement directed by the decree.

A WRIT of *mandamus* issued to these commissioners, reciting that at a court of sewers holden at *Bridgewater*, on the 29th of June 1799, before *Jeffrey Allen*, and other commissioners there named, they made a certain order and decree under their hands and seals, whereby, after reciting that it appeared to them, as well on a special view and survey taken by the said *J. A. &c.* of the place in the parish and Level of *Huntspill* in the said county where a sea wall (describing it) lately stood; as by the presentment of the jurors of the said parish of *Huntspill* duly sworn before the said commissioners assembled at the said court, and which presentment was returned to the said court: that a new sea wall of different size and dimensions was become necessary to protect the Level from inundations of the sea: and that it further appeared from the said presentment, that the late sea wall was in good repair before a violent storm which happened on the 10th of Sept. 1798, which threw down and destroyed it on that day, and on other days between that and the 1st of December following, without any default of the Marquis of *Buckingham, R. Jeffery, &c.* who before then were bound to repair it in certain proportions, by the extreme and unusual violence of the winds and sea: and that the breach made in the land was daily increasing, &c.; it was by the commissioners so assembled ordered and decreed, that a new wall of larger size and dimensions and upon a different principle should be constructed, sufficient to protect the Level, &c. as near as might be on the line of the old

wall; and that all persons who held any lands, &c. within the Level, who had or might have any loss or disadvantage by inundations of the sea for want of a sufficient wall there, or who had or might have any benefit by preventing such inundations, ought to be charged with erecting the new wall, &c. And by the same decree the commissioners deputed C. C. to survey the Level, &c.: and further ordered; that the Marquis of *Buckingham, R. Jeffery, &c.* (and the others who were before bound to the repair) should from time to time advance to the collector in the order named 3000*l.* 1*s.* 10*d.* which the commissioners adjudged to be necessary for the construction of the new sea wall: and which sum was to be repaid to the same persons out of the sum to be raised by a rate or assessment thereafter to be made. And by their decree they also appointed *R. Symes* to be collector of the rate, and *T. Dean* expeditor of the money so to be advanced in building the wall, to whom *R. Symes* was to pay over the money collected by the rate. The *mandamus* then further reciting, that a great part of the new wall had been constructed in pursuance of the said order and decree, and 1900*l.* expended upon it, advanced by the Marquis of *B., R. Jeffery, &c.* in obedience thereto: and that in *Easter* term 43 Geo. 3. a *mandamus* issued to the said late commissioners of sewers for the said county, commanding them to make a rate on the Level for repaying to the said Marquis of *B., R. Jeffery, &c.* the sums so expended and advanced by them; and that the said late commissioners had due notice of the said writ; and that certain proceedings afterwards had before them, respecting the making such rate, were quashed by the Court of K. B. for illegality: and reciting the complaint of the Marquis of *B., R. Jeffery, &c.* that they had required the *now* commissioners (the defendants) to make a rate on the said Level for reimbursing the complainants, which the *now* commissioners had refused to do: therefore the writ commanded them to make a rate on all persons having or holding messuages, lands, tenements, or hereditaments within the said Level of *Huntspill* who had or might have hurt or disadvantage by inundations of the sea for want of a sufficient sea wall there, or who had or might have benefit by preventing such inundations, for repaying to the Marquis of *B., R. Jeffery, &c.* the money advanced by them to the collector beyond their proportions of the expenditure in making the new sea wall.

To this writ the *now* commissioners made a special return; stating that they were appointed by virtue of a commission under the Great Seal, dated the 15th of *April* 1806, and that the former commissioners (naming them, amongst whom were many of the present commissioners) acted under a commission dated the 13th of *April* 1795, which expired on the 13th of *April* 1805, according to the form of the statute. That within the Level of *Huntspill* there are and have been as far back as can be traced several districts or divisions, of known boundaries, (amongst others the district of *Huntspill*) for each of which there has always been, as far back as can be traced, what is called a *standing jury*, constituted thus: on the issuing of a new commission of sewers for the county, the commissioners issue their precept to the sheriff to summon juries for the different districts within the said Level; and the sheriff thereupon summons such persons residing in or near the respective districts, to serve as jurors for the same respectively, as have the best local knowledge and information respecting the matters which may fall under their cognizance; and such jurors are in each district more or less numerous according to its extent. That the jurors so summoned appear at the next sessions of sewers, and severally nominate one of those summoned out of each district for the foreman of the jury of that district. That at such sessions the several juries are sworn before the commissioners (a). That every jurymen so returned and sworn usually continues for life, unless discharged by the commissioners for good cause: in which case some other person is in like

(a) The form of the oath which was here set forth is the same as is noted in 7 East, 72, (a).

managers summoned and sworn into and upon the same jury. That at the times after mentioned *T. Dean, R. Jeffery, &c.* (18 in number) were the *standing jury for the said parish of Huntspill*, one of the said districts, and were all of them resident in or near that parish, and were called the *Huntspill jury*, of which *T. Dean* was the *foreman*. That at a sessions of sewers held at *Bridgewater* on the 21st of *June 1799*, before *Jefferys Allen, &c.* then commissioners, it was ordered that the clerk of the sewers should issue a precept and summons thereon to *T. Dean*, foreman of the *Huntspill jury*, to appear at a sessions of sewers at *Bridgewater* on the 29th of *June 1799*, to make their presentments: and that the said late commissioners did at the same sessions issue a precept under their hands and seals to the sheriff of the county, requiring him "forthwith to issue his warrants and cause to be summoned the several juries of sewers, and other persons fit to serve on such juries belonging to the western division of the said county, personally to appear at a session of sewers at *Bridgewater* on the 29th of *June 1799*, to make presentments of and return on oath all impediments, &c. within their respective views, and also through whose default they have happened, and by whom they ought to be reformed," &c.; which precept was delivered to the sheriff on the 21st of *June 1799*, who on the same day issued the following precept: "*Somerset*, to wit: *J. B.*, sheriff "of the said county to *Mr. Thomas Dean, foreman of the Huntspill jury of sewers*, greeting. By virtue of a precept to me directed under the hands and seals of six commissioners of sewers, &c. these are to give you notice, "that you do appear with the rest of your jury at a sessions of sewers at *Bridgewater, &c.* on the 29th of *June* instant, &c. to make returns of and "present on your oaths the several impediments, and that you make a return "of your precept," &c. Dated 21st of *June 1799*: which precept was on the same day delivered to the said *Thomas Dean*, so being foreman of the said jury; and that no other precept or summons whatsoever was issued either by the then commissioners of sewers, or by the sheriff, his under-sheriff or deputy, to summon any jury of the body of the county, or any jury whatsoever, for any purpose whatsoever, at the said sessions of sewers, held at *Bridgewater* on the 29th of *June 1799*, except as abovementioned. That *Thomas Dean*, as such foreman, did, in pursuance of the sheriff's precept, summon the residue of such standing jury for the parish of *Huntspill* to appear at the said sessions on the 29th of *June 1799*; and at that sessions before *Jefferys, Allen, &c.* then commissioners of sewers for the county, *Thomas Dean* appeared with the sheriff's precept, and the said (jurymen, by name,) having been summoned by *T. Dean*, but by no other person whatsoever, as the standing jury for the parish of *Huntspill*; and they were then and there sworn before the said then commissioners, and took the oath before-mentioned; and thereupon presented, &c. [Here the presentment was set out, describing it to be by the jurors of the parish of *Huntspill*; and stating in substance what was set out in the *mandamus*.] Whereupon the then commissioners, on such presentment made by the jury so summoned, did, at the same sessions, make the order and decree in the writ mentioned: but that no presentment was made to the said sessions of sewers by any jury summoned and returned from the body of the county of *Somerset*, nor was any such jury for that purpose summoned and returned out of the body of the county: nor any other presentment made by any person, except as above set forth. For which reason the commissioners (defendants) suggest that the presentment so made was invalid in law, and cannot safely be proceeded upon by them, and that they ought not to make any rate as they are commanded by the writ.

Several objections were taken to this return on the part of the prosecutors. 1st. That the decree of the 29th of *June 1799*, founded upon actual survey by the commissioners, and the presentment of the standing jury, was the

judgment of a court of record, and that the defect of summons of such jury could not now be inquired into. 2dly, that the jurymen had all been originally selected by the sheriff, summoned by him, and sworn upon the same jury; and that it appears by the return that they were, in consequence of the sheriff's precept delivered to the foreman, by him summoned to appear before the commissioners at the court of sewers by which the decree was made. 3dly, That the appearance of all the jurors cured the defect of formal summonses by the sheriff, if in fact there were any such defect.

But on the first day, when this case came on to be argued in last *Trinity* term, *The Court* intimated great doubt upon a preliminary point; whether, as the decree of the 29th of June 1799 was not fully executed and carried into effect during the existence of the former commission under which it was made, which expired on the 13th of April 1806, by lapse of time according to the provisions of the stat. 13 Eliz. c. 9, limiting the duration of every such commission to 10 years; or at least within one year afterwards in respect to such proceedings as are mentioned in the 2d section of that act; such decree were now capable of being executed by the new commissioners, whose commission is dated the 15th of April 1806; the stat. 23 Hen. 8. c. 5, having directed that such laws, acts, decrees, and ordinances, as shall be made by the commissioners, shall stand good and be put in execution *so long as their commission endureth, and no longer*. And they directed that the case should stand over till the next Crown Paper day, in order to give the counsel an opportunity of considering this objection. When

Burrough for the prosecution argued (a), that the obligation to provide, repair, and maintain sufficient defences against the inundations of the sea over the different Levels exposed to its ravages, arose at common law, and not upon the statute of H. 8. The decree, the validity of which cannot for the reasons before stated be now impeached, is only referred to as evidence of the obligation of the Level to repair in this particular instance, and merely inducement to the mandatory part of the writ. And this decree having in all material points been already carried into execution; and the money having in virtue of it been paid and laid out by the parties named; the law infers an obligation that they shall be reimbursed by a rate on the Level, which has been so found to be benefitted by it. It appears all through *Callis's* Treatise, by writs in the Register (b), by several cases in Lord *Coke's* Reports (c), and even by the stat. 23 H. 8. c. 5, that the general onus of repairing sea banks, &c. was not laid by that statute but arose out of the ancient prerogative of the Crown. For at common law, the King was bound to save and defend the realm from the dangers of the sea as well as against enemies; and commissions of inquiry were used to be granted for this purpose. And in case of damage by extraordinary tempest, which superseded the obligation of individuals to repair, it seems that the Crown used to make the repairs, and afterwards the expences were levied upon the Level by a rate. The regulations therefore of the statute of H. 8. do not affect the operation of this decree; because the thing decreed has been done; the decree remains conclusive evidence on record of the obligation of the persons, having lands, &c. in the Level, to repair the wall in question; and the ending of one commission cannot do away the right of another to enforce the obligation. Assuming, therefore, for the present argument, that the validity of that decree cannot now be controverted for any of the causes returned by the defendants, the obligation itself stands admitted, and there is nothing further for

(a) Only so much of the argument on either side is noticed as applies to the preliminary point suggested by the Court: on which alone the judgment ultimately turned.

(b) These are referred to in 10 Rep. 141, b. 142. Register, 127, 8.

(c) Vide *Keightley's* case, 10 Rep. 140. The case of the *Isle of Ely*, ib. 141, and others there referred to.

the commissioners to inquire of. The reason why the statute of H. 8, and other statutes were passed, was, because new powers were given from time to time to the King's commissioners, which they had not at common law; amongst others, that of making general statutes and ordinances from time to time, to operate prospectively: such also is the power given to them to inquire by the oaths of a jury by whose default the damage happened, and what persons have lands which might be hurt by the inundation, or benefited by the banks, &c. The 7th sect. of the stat. 23 H. 8, gives the commissioners power to make, and ordain *laws*, and *ordinances*, and *decrees*; which word "*decrees*" must be there construed synonymously with *laws* and *ordinances*; i. e. such *decrees* as are of a general nature, containing matter of public regulation, like the by-laws of a corporation. For the statute goes on to give them power to amend or repeal the *same laws and ordinances*; which never could be intended to include *decrees* made in particular causes, whether executed in whole or in part: and *Callis*(a) considers that a *decree* once given is final: unless indeed reversed for error; or, according to the more modern practice, by a commission of review. Then the 17th section provides "that such laws, acts, "*decrees*, and ordinances" (seeming to consider them "all in the nature of *general laws*, &c.) "made by the commissioners," shall stand "good and effectual and be put in due execution *so long time as their* "commission endureth, and no longer: except *the said laws and ordinances* "be made and engrossed in parchment, and certified under the seals of the "said commissioners into the Court of Chancery, and then the king's royal "assent be had to the same." The latter part of the clause shews that the laws, &c. intended to be put in parchment and to be sanctioned by the king, were such as being of a general nature required publicity, and could not be intended of particular *decrees*, which are there used synonymously with *ordinances*. By that act the commission was only to endure for three years; but it was extended to 10 years by the stat. 13 Eliz. c. 9. s. 1.: and that enacts, "that all such laws, ordinances and *constitutions*," (omitting *decrees*) as shall be made by force of any such commission "and written in parchment indented, and under the seals of the commissioners, &c. shall, without any certificate thereof to be made into Chancery, and without the Royal assent, "continue in full force, notwithstanding any determination of any such commission by supersedeas, until the same *laws, constitutions, and ordinances* "shall be altered, repealed, or made void by the commissioners after to be "assigned," &c. Some of these laws, &c. might affect strangers to the Level; and therefore such a power could only be given by act of parliament. The laws and customs of *Romney Marsh* are referred to by the stat. of H. 8. as a model; which laws and customs appear to be coeval with the common law; and probably those or similar customs prevailed in other Levels subject to the same danger. The mischief and inconvenience of extending these statutable provisions, as to the duration of general laws, &c. to particular decrees, would be exceedingly great; for the persons who advanced their money upon the faith, and under the order, of the decree in question, acted under a competent authority at the time, and might have been punishable for disobedience: but if the decree be not final and binding on the Level, or if it be even optional in the new commissioners whether or not they will now enforce it; those persons may be left without protection for the acts they have done by virtue of the decree, and without remedy for their reimbursement. How can they be prepared to go before a new jury, and originate all these proceedings again after the lapse of so many years, and with the probability of many of their witnesses being dead? By the same rule it might be necessary to justify acts done under former commissions half a century ago. The ascertainment of the right or obligation on the Level, and the amount of the sum to be expended on the repair, are the essential parts of the decree;

(a) Call. on Sew. 287. and vide ib. 216, 217.

and these are executed. The latter part of it, directing the reimbursement by a rate on the Level, is merely a legal consequence of the other.

Dampier, contra; after premising, that if there were any failure of jurisdiction the new commissioners would be exposed to actions of trespass by every person on whom the rate was attempted to be levied; contended in support of the preliminary objection, that the decree of the 29th of June 1799, could not be enforced by them after more than a year from the expiration of the old commission under which that decree was made. The words of the statute of Hen. 8. are very precise; that "the laws, acts, *decrees*, and ordinances made by the commissioners, &c. shall stand good, &c. and be put in due execution *so long time as their commission endureth, and no longer.*" There is no reason for putting a different interpretation upon the word *decrees*, as it there stands, than its ordinary sense imports; and so it is considered by *Callis*, *Callis*, 284, 5, 6: for, from the subject-matter of these decrees affecting the whole Level, they partake of the nature of general laws and ordinances. And though some inconveniences may ensue from limiting their effect to the duration of the commission; yet there is an obvious advantage on the other hand in stimulating the commissioners to carry their decrees into speedy execution, and finish their proceedings within the term of their commission; in order that those for whose immediate benefit the burthen is imposed may be the persons to bear it, and not leave it to be borne by others succeeding to them, who may be more remotely benefited by the works. But at any rate a method is provided of preventing the failure of justice in any particular case, by ingrossing the decree in parchment, and certifying it into Chancery under the seals of the commissioners, and procuring the king's assent to it. The 1st sect. of the stat. 13 Eliz. c. 9, only dispenses with the certificate and royal assent to such laws, ordinances, and constitutions, *where the commission is determined by supersedeas*, until altered or repealed by the subsequent commissioners: and the 2d sect. only provides that after the end of 10 years from the *teste* of any commission, all such laws, ordinances, and constitutions as were made by virtue of it, and written *in parchment, indented, and sealed*, as before mentioned, without certificate or the royal assent, shall continue in force for one year next ensuing the end of the 10 years: and during that year power is given to the justices of peace to execute the powers of the former commissioners, unless in the mean time a new commission issue: which was to enable the justices in cases of particular urgency to finish what might have been left undone for want of time under the expired commission. But as this case is not shewn to be within the latter statute, it must be governed by the general provision of that of Hen. 8. The authority of *Callis*, *Callis*, 286, is express, that "all other laws and ordinances of sewers which are but made and writ in paper; or which be but in parchment, and not indented; or which be indented also, if not sealed; continue in force no longer than that commission continueth by the power whereof they were made." Besides, here was a discontinuance in point of time between the expiration of the justices' year and the issuing of the new commission. Then the mischief suggested of making persons trespassers by relation could not happen; for whatever was done under a valid decree, while the commission under which it was made continued in force and for one year afterwards, would be always justifiable: but nothing remaining afterwards to be done could be justified under a new commission: and here the most important part of all, namely, the levying the money by a rate on the Level remains still to be done.

Lord ELLENBOROUGH, C. J., said, that this was a point of great importance and novelty, and they would consider of it. The case accordingly stood over till this term, when his Lordship delivered the judgment of the Court.

This came before the court on a return made by the commissioners of sewers to a writ of *mandamus* commanding them to make a rate on all persons holding messuages, lands, tenements, and hereditaments within the Level of

Huntspill, which have or may have hurt or damage by inundation of the sea for want of a sufficient sea wall, or who may have benefit by preventing such inundation; for repaying to the Marquis of *Buckingham*, *John Tynte Esq.* *Henry Gould Clerk*, *Robert Jeffery*, and *Joseph Hanbury*, the sums of money respectively expended and paid by them to the collector, beyond their proportions of the expenditure in making a sea wall or bank. On the face of the return it appears, that a former commission of sewers issued under the great seal, dated the 13th of *April* 1795. That the commissioners acting under that commission, at a court of sewers held on the 29th of *June* 1799, did make and ordain a certain order and decree under their hands and seals whereby they ordered, decreed, directed, and appointed, that a new sea wall should be built, and that all and every person and persons who had or held any messuages, lands, tenements, and hereditaments, within the Level of *Huntspill*, which had or might have any hurt, loss, or disadvantage by inundations of the sea there, for want of a sufficient wall there, or which had or might have any benefit by preventing such inundations, ought to be charged with the erecting and building such wall. And the commissioners, at the said court, did by their said decree further order, that the Marquis of *Buckingham*, and the other persons named in the order, should pay to the collector the sum of 3000*l.* 1*s.* 10*d.* which they adjudged to be the expence of erecting the said wall, in certain specified proportions; which sums were to be repaid to them out of the sums to be raised by virtue of a rate or assessment to be thereafter made. That in pursuance of that order and decree, great part of the new sea wall had been built, and great part of the said sum of 3000*l.* 1*s.* 10*d.* has been laid out about the building it. That the former commission of sewers, under which the commissioners made the above order and decree, expired on the 13th of *April* 1805, according to the provisions of the statute. That a year after its expiration, a new commission of sewers issued, dated 15th of *April* 1806, appointing the defendants commissioners; and that the order and decree, or that part of it which directed all persons who had messuages, lands, tenements, and hereditaments, within the Level, which might have loss by inundation, or benefit by the wall, to be charged with the erecting it, had not been carried into execution during the 10 years continuance of the commission, or during the year which elapsed between the expiration of that commission and the issuing of the present commission. Upon these facts so appearing on the writ and return, the question is, Whether the commissioners under the present commission have authority to carry into execution or enforce the order and decree of the late commissioners, by making a rate on the several persons holding lands, &c. within the Level, as required by the writ of *mandamus*? And we think they have not. The stat. 23 H. 8. c. 5., directing the form of the commission of sewers, and the powers of the commissioners, provides by section 17, that such *laws, acts, decrees, and ordinances*, as shall happen to be made by the said commissioners, shall stand good and effectual, and be put in due execution, *so long time as their commission endureth, and no longer*; except the said laws and ordinances be made and engrossed in parchment, and certified under the seals of the said commissioners into the King's Court of Chancery, and then the king's royal assent be had to the same. The stat. 23 H. 8. c. 5. was made to endure for 20 years only. The stat. 3 and 4 Ed. 6. c. 8. makes the stat. of Hen. 8. perpetual: adding thereunto, that every commission of sewers thereafter to be awarded shall continue for the term of 5 years next after the *teste* of such commission, unless the same commission shall otherwise be discharged within the same time by *superseas*. Then came the stat. 13 Eliz. c. 9., which enacts that all commissions of sewers shall stand and continue in force for 10 years next ensuing the date of every such commission, unless the same be repealed or determined by reason of any new commission in that behalf made, or by *superseas*. And all

such laws, ordinances, and constitutions, as shall be duly made by force of any such commission, according to the effect and tenor limited in any former statute touching commissioners of sewers, *and being written in parchment indented*, and under the seals of the said commissioners or six of them, shall, without any certificate to be made into the Court of Chancery, and without the royal assent, stand and continue in full force and effect, notwithstanding any determination by *supersedas*, until such time as the same laws, constitutions, and ordinances shall be altered, repealed, or made void by the commissioners after to be appointed. Sect. 2. provides, that, after the end of 10 years from the *teste* of a commission of sewers, all such laws, ordinances, and constitutions, as were made by virtue of such commission, *and written in parchment, indented and sealed*, as aforesaid, without certificate thereof, or royal assent had, shall continue in force for one year, notwithstanding the determination of the commission by the expiration of 10 years; and the justices of peace shall during that year have power to execute the same. Provided, that if a new commission issue, the power of the justices shall cease. In the present case the commission of sewers, under which the commissioners acted who made the order or decree in question, and which is attempted to be enforced by this writ of *mandamus*, continued in force for the space of 10 years from the date of it; viz. from the 13th of April 1795 to the 13th of April 1805; and after its expiration a year intervened before the date of the new commission, 15th April 1806. So that under the above stat. of the 13th of Eliz. all laws, ordinances, and constitutions, though written in parchment indented and sealed, (which was not the case of the order in question,) had ceased, and were no longer in force at the time of issuing the present commission. Is then the order and decree of the 29th of June 1799, made and ordained by the late commissioners as stated in the writ and returns, an "*act, decree, law, ordinance or constitution*," within the meaning of the several acts of parliament above referred to? The statute of Hen. 8. using the terms *laws, acts, decrees, and ordinances*; and the statute of Eliz. using the words *laws, ordinances and constitutions*. On the part of the prosecutors of the writ it has been argued, that *decrees, laws, and ordinances*, mentioned in the statutes, mean laws of *general regulation*, and not *orders and decrees*, such as the one in question, which is in the nature of a judgment. That to construe it otherwise, and to hold that the order and decree is no longer binding after the expiration of the commission, would be to subject all who have acted under such order and decree to actions against them, in which they could not justify under such expired order. But we do not find any authority cited for this distinction. The acts of parliament mean to express the same things by the different words used: the *laws, acts, decrees, and ordinances* mentioned in the act of H. 8. must mean the same things as *laws, ordinances, and constitutions*, mentioned in the act of Queen Elizabeth; and nothing is to be found in the acts of parliament to restrain the generality of the expressions. And it does not seem as if any danger were to be apprehended, that those persons who had acted under the decrees of the commissioners, during the existence of the commission, or while the decrees continued in force, would be subjected to actions: for they would be in the situation of persons who had acted under the authority of a law while it was in force, which had since expired; but which was of force to protect them during the time they had acted, and required its protection. As to so much therefore of the decree as has been acted upon and carried into execution during the time of the late commissioners, it is effectual; and what has been done under it has been done under a competent authority: such part of it as has not been carried into execution cannot now be enforced on the foot of that order or decree, because it has ceased to have any authority; and application must therefore be made to the new commissioners to re-enact it. For these reasons we are of opinion that the return to the *mandamus* is good, and must be allowed.

The King v. The Inhabitants of St. George, Middlesex.

9 East, 127. Nov. 26, 1807.

By the construction of the stat. 39 & 40 G. 3. c. 47, the *London Dock Company* are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their warehouses and other works which are finished and productive, though all the works directed by the act be not completed. But such completed works must under such circumstances be rated for their value at the rate of $\$ 1-2d.$ in the pound, such being the rate calculated upon by the Legislature to raise 139*l.* 8*s.* 7*d.* per quarter upon 3966*l.* the average rent for 10 years preceding the act of parliament on the premises destroyed by the company in making their works; and which quarterly sum the company were at all events bound to pay to the parish during the 12 years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus is to be taken in the first instance by the company in order to reimburse themselves what they may have advanced to the parish, to make good the deficiencies, before any such productive surplus existed, until the company shall be reimbursed.

Therefore, until these purposes are effected, a rate made on the increased real value of the dock premises at more than eight pence half penny in the pound, or a rate of eight pence half penny in the pound on the old average value of the premises before the erection of the company's works, and below the increased value of the new works, is in either case bad.

A RATE was made and allowed on the 30th of *May* 1806, for the relief of the poor of the parish of *St. George*, in the county of *Middlesex*, in which the *London Dock Company* were assessed for warehouses and erections within the site of the *London Docks*, and for the docks, in the sum of 975*l.*, being a rate of 1*s.* 3*d.* in the pound upon an annual value of 15,600*l.*; from which rate the *London Dock Company* appealed to the Sessions, who allowed the appeal, and amended the rate, by reducing the assessment on the company to 139*l.* 8*s.* 7*d.*, subject to the opinion of this Court on the following case:

In pursuance of the stat. 39 & 40 Geo. 3. c. 47, a basin, a large dock, and an extensive quay, have been constructed, and several warehouses erected, within the limits mentioned in that act. On the 11th of *January* 1805, three of the Lords Commissioners of the Treasury certified, that the *several works* following, viz. the basin at *Bell Dock*, the dock communicating therewith, the tobacco warehouse, and certain other warehouses, vaults and quays particularly enumerated, all situated within the premises belonging to the company, were then *so far completed* as to be fit and proper in every respect for the reception of tobacco, rice, wine, brandy, geneva, and other spirits: which certificate was published in the *London Gazette*, and in two morning papers usually circulated in *London*, on the following day. On the 29th of *May* 1805, a similar certificate was made, and duly published on the following day, relative to the warehouse No. 3., on the north side of the dock. On the 17th of *May* 1805, a similar certificate was made, and duly published on the following day, relative to the warehouses No. 2. and 5, on the north side of the dock, and the vaults underneath, &c. and the quay in front of the same. And on the 1st of *June* 1805, a similar certificate was made, and published on the following day, relative to the warehouse No. 4. on the north side of the dock, the vault underneath it, and the quay in front of the same. On the 31st of *January* 1805, the principal dock and outer basin was opened for the reception of shipping; and from that time down to the making of the rate, ships were received in the dock and basin, and their cargoes unloaded on the quays, and great part stowed in the warehouses; and the rates prescribed by the statute for dockage, quayage, wharfage, &c. were paid there to the *London Dock Company*. In *January* 1806, a dividend, pursuant to the statute, of two and a half per cent, and property tax thereon, was declared and paid. The capital upon which dividend was paid exceeds 1,200,000*l.* On the 1st of *Sept.* 1804, a warehouse for tobacco, being part of the said warehouses,

was agreed to be let by the *London Dock Company* for 15,600*l.* *per ann.* gross rent; the company paying all taxes: such rent to commence from the 1st of *Feb.* 1805: and the company received the said rent from the last-mentioned date until the making of the said rate. The said tobacco warehouse, and the dock and quay, and the said warehouses Nos. 1, 2, 3, 4, and 5, on the north side of the dock, and the basin, are all within the parish of *St. George*, and are of a higher annual value than the sum at which the company are assessed for the same. The act of parliament empowers the company to purchase a very large extent of ground, comprising about 96 acres; of which about 50 only are yet used, and it is intended to use the remainder. Various works are now in their progress, and carrying into execution with as much expedition as the nature of the case will allow. Of 19 warehouses within the parish of *St. George*, begun before the date of the rate, six only (including the tobacco warehouse) were then finished, and in use. Another entrance to the dock at the *Hermitage* remains to be made; and the company are now treating with the proprietors of the land adjoining for the purchase of the same. From *Midsummer* 1801 until the making of the rate appealed against, the *London Dock Company* paid the parish of *St. George* 139*l.* 8*s.* 7*d.* quarterly; the same being calculated, pursuant to the directions of the statute, on an average of the produce of the poor's rate for 10 years preceding on the premises destroyed by the company. It was afterwards added to the case, that the parish has not yet reimbursed the company any part of the sums advanced by the company to the parish in respect of the deficiencies in the assessments for the poor rates. And the company has not paid either the rate in question or any subsequent rate.

The case was argued in last *Trinity* term, by *Best*, Serjt., *Garrow*, *Holroyd*, *Pooley*, and *Bosanquet* for the Company; and by *The Attorney-General*, *Gurney*, and *Gleed*, for the parish. And now

LORD ELLENBOROUGH, C. J. delivered the opinion of the Court. This matter comes before the Court on a motion to quash an order of sessions, allowing an appeal of the *London Dock Company* against a rule made for the relief of the poor of the parish of *St. George, Middlesex*, by which the company were assessed for warehouses and erections within the site of the *London* docks, and for the docks, in the sum of 975*l.*; being a rate of 1*s.* 3*d.* in the pound upon an annual value of 15,600*l.*; and reducing the rate on the company to 139*l.* 8*s.* 7*d.*, subject to the opinion of this Court upon a case stating, among others, the following facts; to which it is sufficient to advert in giving the judgment of the Court. In pursuance of the stat. 39 & 40 *Geo.* 3. c. 47, a basin, a large dock, an expensive quay, and several warehouses, having been erected within the limits mentioned in the act, three of the Lords Commissioners of the Treasury on the 12th of *Jan.* 1805, and on the 24th of *May* in the same year, made certificates, that a basin, certain docks, quays, and warehouses, mentioned in those certificates, were so far completed as to be fit and proper for the reception of certain commodities therein mentioned; which certificates, were published in the *London Gazette*. That, subsequent to these certificates, ships had been received into the docks, their cargoes unloaded on the quays, stowed in the warehouses, and the rates prescribed by the statute for the dockage, quayage, wharfage, &c. paid to the company. That various works are now in their progress, and carrying into execution with as much expedition as the nature of the case will allow. That of nineteen warehouses begun before the making the rate, six only were then finished and in use; and that another entrance dock at the *Hermitage* remains to be made. And that from *Midsummer* 1801, until the making the rate appealed against, the company have paid the parish 139*l.* 8*s.* 7*d.* quarterly: the same being calculated pursuant to the directions of the statute on the premises destroyed by the said company: being at the rate of 8*l.* 1*s.* 2*d.* in the pound per quarter upon 3966*l.*, the average rental calculated upon the ten years pre-

ceding the act of parliament; and the rate appealed against being at the rate of 15d. in the pound upon a rental of 15,600*l*. And it is further stated, by an addition to the case, that the parish has not yet reimbursed the company any part of the sums which have been advanced by them to the parish in respect of the deficiencies in the assessments for the poor's rates.

Upon this case two questions have been made, 1st, Whether, during the space of 12 years from the passing the stat. 39 and 40 Geo. 3., the company are exempted from paying a larger sum than the average produce of the poor's rate from *Lady-day* 1790 to *Lady-day* 1800, if all the works directed by the act be not completed; though others of the works should be finished, and be productive. And, 2dly, Although the company during such period, and under such circumstances, may not be liable to pay a larger sum for the *docks and quays*; whether they be not liable to pay, on account of the *warehouses* they have built, a further sum beyond such average rate. And with respect to this last question, we think that the docks, quays, and warehouses stand on the same footing; for the 59th section of the act, which gives the company a power to receive rates and duties, gives them a duty for every article of merchandize, *which shall be landed within the dock premises*, not exceeding the rate or charge theretofore usually paid in the port of *London*, for landing, loading, and *housing* every such article, during the year 1798: from whence it may be fairly inferred, that the Legislature meant that there should be buildings or warehouses, in which goods might be *housed* on their being landed; and that warehouses for such purpose were considered by the Legislature as a part of, and comprehended within, the description of *the dock premises*. As to the first question; that depends on the construction of the 106th section; it is in substance as follows. That during the term of 12 years, or until the works directed by the act should be completed, the company should be liable to the extent of the average sum raised for the last 10 years preceding the passing the act, to make good the deficiency occasioned by the alterations, or making the docks, *and other works and premises which should belong thereto*. And that when after the act should be carried into execution the produce of the several assessments for all and singular such houses, lands, and hereditaments, as should be standing upon, or be part of the lands purchased for making the said docks and other works, should at the same rate per pound, (that is, at the rate at which such average sum was calculated) raise a larger sum than the assessments from *Lady-day* 1790 to *Lady-day* 1800, in respect to the houses and lands to be purchased by the company, raised within that period; that then the surplus should, in the first place, be applied from time to time to reimburse the company what they should have paid for, or in respect of the deficiencies occasioned by, the alterations caused by making the docks and other works, until the company should be wholly reimbursed and repaid all the monies they should have paid on account of the deficiencies. From this statement of the section it appears, that its first object was to indemnify the several parishes, within which the dock works were carried on, from the deficiencies in the rates which should be created by the alterations made by the company; which alterations it was foreseen would render a great deal of property unproductive for a time, and not the subject of an assessment. And the means by which it provided for this object was the imposing on the company an obligation to pay any deficiency to the extent of an average assessment for the preceding ten years. And had the act had nothing else in its contemplation than making, as was contended, a bargain by which the company should be bound to pay, and the parish to receive, for 12 years, or until the works were finished, a certain sum, the clause would have stopped at the proviso: instead of which it proceeds to provide for its second object, by directing what shall be done with the surplus, when, after the act should be carried into execution, a larger sum should be raised at the same rate per pound than the produce of the several assessments on the houses and lands

purchased by the company. This second object was the reimbursing the company the sums they should have paid on account of the deficiencies: and this reimbursement was to be effected by paying such surplus to them. But as it is clear that there could be no surplus, unless the sum raised at the same rate per pound could increase, it follows that the intention of the Legislature was, that the docks, quays, and other new works, made by the company, should be assessed; and not that a sum equal to the deficiencies, calculated on an average for the 10 years before the passing the act, should be paid for the space of 12 years, or until the works directed by the act should be completed. We therefore think the intent of the Legislature was, that as soon after the act should have been carried into execution, and the docks became so productive as, at the same rate per pound as that by which the sum of 139*l.* 8*s.* 7*d.* per quarter was raised, say at 8 1-2*d.* in the pound, to raise a larger sum; that the docks and other productive works should be assessed at that rate, according to their rental, or other rule observed in making rates. But as it appears in this case, that the rate appealed against was a rate of 1*s.* 3*d.* in the pound; whereas the rate by which the 139*l.* 8*s.* 7*d.* was raised was at 8 1-2*d.* in the pound; the assessment appealed against is bad, as having been made at a higher rate than the act directs. And on the other hand, as the Sessions have reduced the sum to what a rate of 8 1-2*d.* in the pound would produce upon a rental of 3986*l.*, instead of reducing it to what a rate of 8 1-2*d.* in the pound would produce on a rental of 15,600*l.* (which we assume to be the fair rental of the productive works) their order is wrong, and must be quashed, and a new rate be made: for we think, that it is evident from the recital of the 1st section of the stat. 43 Geo. 3. and the statement of the facts in this case, that the works directed by the stat. 39 and 40 Geo. 3. have not yet been completed; and till then, or the expiration of the 12 years mentioned in the statute, and (while there is any thing remaining to be paid to the company,) the operation of the 106th section, on which the goodness of the rate depends, is to continue.

O'Callaghan and Fagan, surviving Executors of Wm. Stopford, v. Sir John Ingilby, Bart.

9 East, 135. Nov. 26, 1807.

1. Where tenant for life conveyed estates to trustees for 99 years, if he should so long live, in trust to raise money by the grant of annuities for his life; and afterwards he and the trustees granted an annuity to one by deed, reciting the former conveyance to the trustees; it is not necessary by the annuity act 17 Geo. 3. c. 28. to enrol a memorial of the trust deed; it not being "a deed, instrument, or assurance whereby any annuity is granted," but only a deed of conveyance to those who afterwards granted the annuity, and constituting their title to the estate charged therewith.
2. Where the memorial of a bond, conditioned to secure an annuity, recited in the condition an indenture between the same parties, and part of the same assurance, which sited the annuity to be granted "for the price of 1800*l.* which said sum of 1800*l.* was paid by the grantee to the grantors by his draft on R. and Co. his bankers, at or before the sealing and delivery of the said indenture and bond;" and the memorial of the said indenture stated that the indenture witnessed, that, "in consideration of 1800*l.* to the grantors, in hand paid, by the grantee, and which was paid to them by his draft on R. and Co. his bankers, &c. the payment and receipt of which said 1800*l.* the grantors did thereby acknowledge," the annuity was granted: this does sufficiently import, that the consideration money was actually received by the grantors, through the medium of the draft, before the execution of the deeds granting the annuity; so as to dispense with the necessity of setting out in the memorial the particulars of such draft, with the time of payment.
3. The annuity act does not require that the estates charged with the annuity should be specifically set forth in the memorial: and therefore it is no objection that the memorial only stated the annuity to be charged on all the grantor's estates in the county of York, and all other his premises conveyed to certain trustees.

4. It is no objection to the memorial of the deed granting the annuity, that it stated it, in general terms, to contain "powers of distress and entry, as stated in the deed;" for the annuity act does not require such powers to be stated, except so far as they create a trust, which brings them within the branch of the act relating to trustees. Nor,
5. Is the memorial required to state the covenants of the grantors for the due payment of the annuity.

THE plaintiffs declared in debt on two bonds to the testator, one of them dated the 8th of *April* 1794, in the penal sum of 3600*l.*, conditioned for payment to him of an annuity of 200*l.* during the life of the defendant: the other dated 7th of *June* 1794, in the penal sum of 1800*l.* The condition of the first bond, set forth on oyer, recited an indenture tripartite, of the same date as the bond, made between the defendant of the first part, *W. Morland* and *T. Hammersley*, bankers and partners, of the second part, and the testator *W. Stopford* of the third part; reciting that *Morland* and *Hammersley*, in pursuance of the trusts of that indenture, and with the defendant's privity, had contracted with *Stopford* for the sale of an annuity of 200*l.* to him during the defendant's life, and to be secured in the manner therein mentioned, for 1800*l.*, which *Stopford* paid to *Morland* and *Hammersley* by his draft on *Ransom* and Co. his bankers, at or before the sealing and delivering of the said indenture and of this bond, to be by them applied upon the trusts, mentioned in the same indenture; the defendant then pleaded, 1st, *non est factum*. 2dly, That *there was no memorial* of the bond enrolled in the Court of Chancery pursuant to the annuity act 17 Geo. 3. c. 26. 3dly, That by indenture of the 11th of *March* 1794, between the defendant, and *Morland* and *Hammersley*; after reciting that the defendant was seised of divers lands, &c. in the county of *York*, in the indenture particularly described, for his life; remainder to trustees to preserve contingent remainders, with divers remainders over; subject to certain incumbrances therein mentioned: and further reciting, that the defendant had granted to several persons named in a schedule thereunder written, during his life, the several annuities specified in the said schedule, amounting together to 1690*l.* *per ann.*; and that several of the annuitants had agreed to accept their purchase money, and surrender their respective annuities, so that the same might be merged and extinguished; and that others had agreed to deliver up their then securities, and to accept of other securities in lieu thereof, upon *Morland* and *Hammersley* guarantying the payment during the defendant's life: so that all the annuities subsisting and to be granted should not exceed 2500*l.* *per annum*. And after further reciting, that the defendant had applied to *Morland* and *Hammersley* to assist him, and to enter into the necessary securities with him to guaranty the payment of such annuities; and in order to indemnify them from all risk and expence thereby, the defendant had agreed to grant and demise to them the several premises thereinbefore mentioned, upon the trusts thereafter expressed; which *Morland* and *Hammersley* had agreed to: the indenture witnessed, that the defendant, for the considerations therein expressed, conveyed and demised to *Morland* and *Hammersley*, and their executors, &c. the aforesaid lands, &c. for the term of 99 years, if the defendant should so long live, upon the several trusts, &c., and subject to the powers, &c. therein declared, &c. viz. upon trust that *M.* and *H.*, or the survivor, &c. should raise money by granting annuities, so as the same should not be less than eight years purchase, nor exceeding in the whole, with the former subsisting annuities, 2500*l.* *per ann.*, payable during the defendant's life, &c., and to be issuing out of and charged upon the said lands, &c. thereby granted and demised, and to be secured by the usual and proper powers, remedies, and estates; with powers of redemption. And it was thereby agreed, that *M.* and *H.* should stand possessed of and interested in the said demised premises, and of all sums raised under the said indenture in trust, (1st,) to retain all their reasonable charges and expences: (2dly,) To re-purchase and discharge so many of the said

scheduled annuities, and to pay the several debts due from the defendant as aforesaid, in such manner as the defendant should think proper and expedient, and direct or appoint: and after such deductions and payments, upon trust; (3dly) to pay the surplus of the monies raised to the defendant, or such persons as he should direct, for his and their own use: (4thly,) Out of the rents, issues, and profits of the said lands, &c. to pay the several annuities, which during the continuance of the trusts should be charged upon the premises: (5thly,) upon trust that if *M.* and *H.* should enter into any covenant or agreement for the payment of any annuities so to be granted by them, &c., it should be lawful for them, so long as the said annuities should continue payable, to retain and deduct out of the said rents and profits *5l. per cent.* upon the sum so covenanted to be paid by them; and (6thly,) from time to time to pay all expences incident and appertaining thereunto, and all charges and expences which they, *M.* and *H.*, should be put to in or about the collecting and receiving the rents and profits of the premises, or in preparing the necessary conveyances for securing payment of the annuities directed to be granted, or otherwise relating to the trusts thereby created: (7thly,) To pay the residue of the rents, issues, and annual profits of the premises to the defendant, for his own use. And it was thereby further declared, that all deeds and assurances to be executed by *M.* and *H.* or the survivor, &c. in pursuance of the said trusts, should to all intents and purposes whatsoever be as valid in law, although the defendant should not execute the same, as if he had joined therein, &c.; and that the receipts of *M.* and *H.* should be an effectual discharge to all persons paying them, &c. without being accountable for their misapplication. Which said indenture of the 11th of *March* 1794 was duly executed by the defendant, *Morland*, and *Hammersley*, in the presence of *W. S.* and *J. S.* The plea then stated, that after the passing of the stat. 17 Geo. 3. c. 26., and after the making of the last-mentioned indenture, the defendant, on the 5th of *April* 1794, executed the bond in the first count mentioned with the condition as aforesaid: and that the defendant and *Morland* and *Hammersley* did also execute the said indenture tripartite mentioned in the said condition, and bearing the same date with the bond: by which last-mentioned indenture, after reciting as herein-before and in the said indenture of the 11th of *March* 1794 is recited; and further reciting several other matters in that indenture contained; and also that *Morland* and *Hammersley*, in pursuance of the trusts in the indenture of the 11th of *March* 1794, and with the privity and approbation of the defendant, testified by his being a party thereto contracted with *W. Stopford*, (the testator) for the sale of a clear annuity to him of 200*l.* during the term of 99 years, if the defendant should so long live, and to be secured in manner aftermentioned, for the price of 1800*l.*; and after further reciting that for securing payment of the said annuity the defendant had given his bond for 3600*l.* in the first count mentioned, conditioned to be void upon payment of the said annuity; the indenture witnessed, that in performance of the said agreement, and in consideration of the said 1800*l.* to *Morland* and *Hammersley* at or before the sealing and delivery of the said indenture in hand well and truly paid by *Wm. Stopford*, to be by them *M.* and *H.* applied upon the trusts of the above recited indenture of demise; the payment and receipt of which said 1800*l.* they, the defendant, *Morland* and *Hammersley*, did by the said indenture acknowledge, and from the same did acquit *Stopford*; and for the better securing the payment of the said annuity pursuant to the condition of the said bond, and also in consideration of 10*s.* to the defendant paid at or before the sealing and delivery, &c., they the said *Morland* and *Hammersley*, in pursuance of the trusts of the above-recited indenture of demise, and with the consent of the defendant, testified by his being party thereto, &c., and also he the defendant, and each of them, by his indenture did grant and confirm unto *Stopford* for 99 years, if the defendant should so long live, an annuity of 200*l.* issuing out of and

charged upon the aforesaid lands, &c. described in and granted and demised by the above-recited indenture of demise unto *M. and H.* as aforesaid, to be paid to *Stopford* quarterly, at the banking-house of Messrs. *Ransom, Morland and Hammersley*, in *Pall-Mall*, without any deduction or abatement whatsoever for or in respect of any taxes, charges, &c. or assessments whatsoever then or at any time thereafter to be imposed, &c. on the several premises, &c. or on the said *Stopford* in respect of the annuity, &c. The deed also contained covenants by *Morland and Hammersley* for their own acts, and by the defendant for his own acts and theirs, and against the acts and deeds of all other persons; and that if the annuity should be in arrear for 21 days, it should be lawful for *Stopford* to enter and distrain, &c.; and that if the annuity should be in arrear for 40 days, it should be lawful for him to enter upon and hold the said lands thereby charged, and take the rents and profits until all arrears, &c. should be satisfied, without impeachment of waste. And the defendant, *Morland*, and *Hammersley*, jointly and severally covenanted with *Stopford* to pay him, his executors, &c. the annuity of 200*l.* secured by the said bond and indenture, clear of all deductions. The indenture also contained a clause of redemption on re-payment of 1800*l.* and the arrears. It also contained a covenant by the defendant, that he and *Morland and Hammersley*, or some or one of them, had a right to grant the said annuity of 200*l.*; and to charge the premises therewith; and also a covenant for further assurance: and also a joint and several covenant by the defendant, *M. and H.*, that no act had been done by them to prevent them from granting the annuity. The plea then stated, that no memorial of the indenture of the 11th of *March* 1794, and of the trusts therein mentioned, was inrolled in the Court of Chancery, pursuant to the statute. 4thly, The defendant pleaded also to the first count, that no memorial of the indenture tripartite of the 8th of *April* 1794, mentioned in the condition to the bond, was inrolled, &c.

The plaintiff by his replication took issue on the plea of *non est factum*; and to the 2d and 4th pleas pleaded, that a memorial of the bond in the first count mentioned, and of the condition, and of the indenture tripartite of the same date mentioned in the condition of the bond, containing the day of the month and the year when the same was dated, and the names of all the parties thereto, and for whom any of them were trustees, and of all the witnesses thereto, and setting forth the annual sum to be paid, and the name of the person for whose life the annuity was granted, and the consideration of granting the same, was within 20 days of the execution of the bond and indenture tripartite, viz. on the 26th of *April* 1794, inrolled &c. according to the form and effect of the act, &c.; which memorial is as follows; viz.—A memorial to be inrolled pursuant to an act, &c. of a bond dated the 8th of *April* 1794, under the hand and seal of Sir *John Ingilby* of, &c. whereby he became bound to *W. Stopford* of, &c. in the penal sum of 3600*l.* with a condition, &c.; reciting, amongst other things, an indenture tripartite bearing even date with the said bond, and made between Sir *J. I.* of the first part, *Morland and Hammersley* bankers, of the second part, and *W. Stopford* of the third part; and that *M. and H.*, in pursuance of the trust reposed in them by the said indenture, had with the privity and approbation of Sir *J. I.* contracted and agreed with *Stopford* for the sale to him of a clear annuity of 200*l.* to be paid, &c. during the term of 99 years, if Sir *J. I.* should so long live, and to be secured in the manner therein mentioned for the price of 1800*l.*; which said sum of 1800*l.* was paid by *Stopford* to *M. and H.* by his draft on Messrs. *Ransom and Company*, his bankers, at or before the sealing and delivery of the same indenture and of the said bond. And the condition of the said bond was, &c. (setting it out as before expressed) which said bond was duly executed by Sir *J. I.* in the presence of, &c. (setting out the names, &c. of the Witnesses.) The replication also set out the memorial of an indenture of three parts, dated the 4th of *April* 1794, between Sir *J. I.* of the first part, *Mor-*

land and Hammersley of Pall Mall, bankers, of the 2d part; and W. Stopford of the 3d part; the said M. and H. being trustees as well for the said Sir J. I. as the said W. Stopford; whereby after reciting, amongst other things, that M. and H. in pursuance of the trust reposed in them by a certain indenture of demise, dated 11th of March then last and therein recited, had with the privity and approbation of Sir J. I. testified as therein mentioned, agreed with W. Stopford for the sale of a clear annuity of 200l. to be paid to W. S. his executors, &c. during the term of 99 years, if Sir J. I. should so long live, and to be secured in manner thereafter mentioned for the price of 1800l.; and that for securing the said annuity Sir J. I. by his bond of the same date, with the indenture of which this writing purports to be a memorial, had become bound to W. S. in 3600l., conditioned to be void on payment by Sir J. I. to W. S. during the term of 99 years, if Sir J. I. should so long live, an annuity of 200l. on the days, &c. mentioned; it was by the indenture now memorialized witnessed, that in consideration of 1800l. to Morland and Hammersley in hand paid by W. S., and which was paid to them by his draft on Messrs. Ransom and Co. his bankers, to be by them M. and H. paid and applied upon the trusts and for the intents and purposes declared by the said indenture of demise of the 11th of March (the payment and receipt of which said 1800l. they, Sir J. I. Morland and Hammersley did thereby acknowledge :) and for better securing the payment of the said annuity, Morland and Hammersley, in pursuance of the trusts reposed in them by the said indenture of demise, and with the consent of Sir J. I. and also Sir J. I. did, and each of them did grant and confirm to W. S. during the term of 99 years if Sir J. I. should so long live, an annuity of 200l. to be issuing out of and charged upon all and every the manors, lands, &c. of Sir J. I. in the county of York, and all and singular other the premises of him Sir J. I. mentioned and described in and granted and demised by the said indenture of demise of the 11th of March last, to have and take the said annuity unto W. S. &c. during the term, &c. and to be paid to the said W. S. by four quarterly payments, &c. at the banking-house of Messrs. Ransom, Morland, and Hammersley, Pall in Mall, without any deduction or abatement whatsoever on account of taxes or otherwise howsoever; with such powers and remedies by distress and entry on the said premises for the recovery of the said annuity as therein are contained: and in which said indenture is contained a proviso, that Sir J. I. shall be at liberty to re-purchase the said annuity on giving W. S. &c. three calendar months' notice, and on payment of 1800l. &c.: and this indenture was duly executed by Sir J. I., W. Morland, and T. Hammersley, in the presence of J. S. of, &c. and E. G. &c. To the third plea the plaintiff demurred generally. And the defendant demurred to the plaintiff's replication to his 2d and 4th pleas: and there were similar pleas, replications, and demurrers to the second count on the other bond.

This case was argued at considerable length, by *Holroyd* for the plaintiffs, and *Wetherell* contra; and a great many objections were taken to the grant of this annuity, as well for the want of a memorial of the deed of the 11th of March 1794, conveying the defendant's estates to *Morland* and *Hammersley* in trust to raise money for him by way of annuity; and of the several trusts therein contained; as for the several defects of the memorials of the bonds and conditions of the deed of the 8th of April 1794, granting the annuity. The objections arising from the want of a memorial of the several trusts contained in the deed of the 11th of March 1794 became eventually unnecessary to be considered; and the other objections were distinctly stated and answered by the Court in giving the judgment; which was now delivered by.

LORD ELLENBOROUGH, C. J. This case comes before the Court on a demurrer pleaded by the plaintiff's to the defendant's third plea, and on demurrers pleaded by the defendant to the plaintiff's replications to the defendant's second and fourth pleas. The plaintiffs declare in debt on a bond executed by the de-

defendant to the plaintiff's testator, *W. Stopford*, conditioned for payment of an annuity of 200*l.* per ann. during the life of the defendant, Sir John *Ingilby*. The condition of the bond recited an indenture tripartite, dated 8th of April 1794, between the defendant, Sir *J. Ingilby*, of the first part, *Morland and Hammersley*, bankers, of the second part, and the said *Stopford* of the third part; reciting that the bankers, in pursuance of the trusts reposed in them by that deed, had contracted with *Stopford* for the sale to him of one annuity of 200*l.* per annum during the life of Sir *J. Ingilby*, for 1800*l.*, which sum *W. Stopford* paid to *Morland and Hammersley* by his draft on *Barrow and Co.*, his bankers, at or before the sealing and delivering of the said indenture and bond. The defendant then pleads, 1st, *Non est factum*. 2d, That there was not any memorial of the said bond inrolled pursuant to the statute. 3d, That by indenture of the 11th of March 1794, Sir *J. Ingilby* conveyed to *Morland and Hammersley* certain estates in *Yorkshire*, of which he, Sir *J. Ingilby*, was tenant for life; to hold to *Morland and Hammersley*, their executors, administrators, and assigns, for 99 years, if Sir *J. Ingilby* should so long live, upon trust to raise such sums of money as they should be able, by granting annuities for the life of Sir *J. Ingilby* not exceeding 2500*l.* per annum. That afterwards he, Sir *J. Ingilby* executed the bond; and that he, and *Morland and Hammersley*, executed the deed of the 8th of April 1794, in the condition of the bond mentioned, being the deed granting the annuity to *Stopford*, (which is stated at length in the plea :) and then the defendant pleads that a memorial of the deed of the 11th of March 1794, (being the conveyance of Sir *J. Ingilby's* estate to *Morland and Hammersley*,) and of the trusts therein mentioned to be reposed in *Morland and Hammersley* by that deed, was not inrolled pursuant to the statute. 4th, That no memorial was inrolled of the deed of the 8th of April 1794 mentioned in the condition of the bond, (being the deed granting the annuity to *Stopford*.) To these pleas the plaintiff replies; taking issue on the *non est factum*: and to the 2d plea he in his replication sets out the memorial of the bond and condition. To the 3d plea the plaintiff demurs. To the 4th plea he sets out the memorial of the deed of the 8th of April 1794. The defendant, by way of rejoinder, demurs to the replications to the 2d and 4th pleas, which stated the memorials of the bond and condition, and of the deed of the 8th of April 1794, (the deed granting the annuity.) So that the questions are, 1st, Whether under the annuity act 17 Geo. 3 c. 26, a memorial ought to have been inrolled of the deed of the 11th of March 1794, by which Sir *J. Ingilby* conveyed his estates to *Morland and Hammersley*, in trust to raise money by grants of annuities; for if a memorial ought to have been inrolled of that deed, inasmuch as none has been inrolled, judgment ought to be for the defendant. 2dly, Whether the memorial of the bond and condition which has been inrolled, and which memorial is stated at length in the plaintiff's replication to the defendant's second plea, be or be not a sufficient memorial within the statute. 3dly, Whether the memorial of the deed of the 8th of April 1794, (being the deed granting the annuity) which has been inrolled, and which is stated at length in the plaintiff's replication to the defendant's 4th plea, be or be not a sufficient memorial of that deed within the statute.

A variety of objections have been taken on behalf of the defendant, Sir *J. Ingilby*, to the validity of this annuity. The ten first objections apply to the want of a memorial of the deed of the 11th of March 1794, being the deed by which Sir *J. Ingilby* conveyed his estates to *Morland and Hammersley*, particularizing the several parts of that deed, which the counsel for the defendant contends ought to have been stated in a memorial. But as the Court is of opinion, that that deed is not within the true intent and meaning of the annuity act, "a deed, instrument, or assurance, whereby an annuity is granted," it is not necessary to enter into that set of objections more particularly. It is not a deed whereby the annuity is granted; but a deed conveying the

estates to *Morland and Hammersley*, who afterwards grant the annuity to the plaintiff. It might never have been followed by the grant of any annuity at all, or not till after a long interval; and until some annuity shall be granted, it cannot be necessary to enrol a memorial of it: but before that time shall arrive the period may have expired within which by the terms of the annuity act a memorial of such deed is required to be enrolled; as was the case with respect to the present annuity. The act requires a memorial to be enrolled within 20 days of the execution of such deed; which shews that the Legislature had in contemplation such deeds only as formed the grant or assurance of the particular annuity, and not such as constituted the title of the grantor(1). On this ground, therefore, the plaintiff will be entitled to judgment on his demurrer to the defendant's third plea. The defendant has also taken several objections to the memorials enrolled of the bond and indenture of the 8th of April 1794, which is the deed granting the annuity to the plaintiff: of which memorials are set forth in the replications to the second and fourth pleas; to which replications the defendant has demurred. These objections are, 1st, That the memorial of the deed of the 8th of April 1794 does not set forth the draft by which the consideration money was paid. 2. That it does not set forth the estates charged with the annuity. 3. That it does not set forth the exemption of the annuity from parliamentary and other taxes. 4. That it does not set forth sufficiently the powers of entry and distress. 5. That it does not set forth the covenants of Sir John Ingilby, and of *Morland and Hammersley*, for the due payment of the annuity. Of these five objections the first had most weight with us; (viz.,) That supposing it to appear upon the memorial that the consideration was not paid in money, but by a draft; which draft had not been converted into money before the execution of the deeds; the particulars of the draft are not set forth. Because it has been determined by several cases, that where the consideration was not paid in money, but by a draft, the particulars of that draft must be set forth: as in *Rumball v. Murray*, 3 Term Rep. 298, *Berry v. Bentley*, 6 Term Rep. 690, *Pool v. Cabanes*, 8 Term Rep. 323. And it is equally clear, that if paid by a draft converted into cash before the execution of the deeds, the particulars of the draft need not be stated. It becomes material, therefore, to advert to the terms in which the payment of the consideration is stated in the different instruments as they appear in the memorial stated on the record. The indenture recited in the condition of the bond states the consideration thus,—“at or for the price or sum of 1800*l.*: which said sum of 1800*l.* was paid by the said *Wm. Stopford* to the said *Wm. Morland* and *Thomas Hammersley* by his draft on Messrs. *Ransom* and Co., his bankers, at or before the sealing and delivery of the said indentures and bond.” The annuity deed, as stated in the memorial of that deed, states the consideration thus—“in consideration of the sum of 1800*l.* of lawful money of Great Britain to the said *Wm. Morland* and *Thomas Hammersley* in hand paid by the said *W. Stopford*, and which was paid to them by his draft on Messrs. *Ransom* and Co., his bankers,” to be by them the said *W. Morland* and *T. Hammersley* paid and applied upon the trusts and for the intents and purpose declared by the above mentioned indenture. And the question is, whether these statements necessarily import that at the time of executing the deeds the money had not been paid to *Morland* and *Hammersley*, but only the drafts: and we think that they do not so necessarily import, that only the draft was paid to them; but that it may fairly be understood that the money was paid. The statements both aver payment of the money: viz. which sum of 1800*l.* was paid at or before the sealing and delivery of the deed and bond; and the statement adds the means by which the money was paid, viz. by a draft of the said *Wm. Stopford* on his

(1) Vide *Henderson & al. v. Glencairn*, 2 Taun. 235.

bankers. It must be recollected, that the part of the annuity act on which this objection is founded is the first section which requires the memorial to set forth "the consideration or considerations of granting the annuity:" and the "third clause, which requires that in every deed, whereby an annuity is granted, the consideration really and *bona fide* shall be fully and truly set forth:" and if the fact were, that the money was not paid to or received by *Morland* and *Hammersley* before the deeds were executed, but only a draft, the defendant might have so pleaded the fact; which he has not done; and therefore the Court may well construe the words of the memorial as averring that the money had been paid by the means of a draft previously given; which construction the words seem fully to justify. The other four objections made to the memorial of the indenture of the 8th of April, 1798, appeared at the time of the arguments not to be supported by the annuity act, or by the fact. The estates charged with the annuity are not by any clause of the act required to be stated; and in fact the memorial states the annuity to be charged on, and issuing, and payable out of all the estates of Sir *J. Ingilby*, in the county of *York*, and all other the premises of Sir *J. Ingilby* granted to *Morland* and *Hammersley*. The objection that the memorial does not state that the annuity is exempted from parliamentary and other taxes is answered by the fact; the memorial stating the annuity to be paid without any deduction or abatement whatsoever on account of taxes or otherwise howsoever. The objection that the memorial does not sufficiently set forth the powers of entry and distress is answered by the fact of the memorial stating, "with powers of distress and entry, as stated in the deed;" and the annuity act does not require such powers of entry and distress to be stated, except so far as they create a trust, which brings them within the branch of the act relative to trustees. And the last objection, that the covenants of Sir *J. Ingilby*, and of *Morland* and *Hammersley*, for the due payment of the annuity, are not stated in the memorial, fails; inasmuch as such covenants are not required to be stated; and it does appear that they are the grantors of the annuity. The consequence of this opinion, which the Court has formed on the several objections made on the part of the defendant to these memorials, is, that the plaintiff is also entitled to judgment on the demurrers pleaded by the defendant to the plaintiff's replications to the second and fourth pleas.

Field v. Jones, Marshal of the King's Bench Prison.

9 East, 151. Nov. 26, 1807.

A day-rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the Court on the same day; though the marshal were sued for the escape before the sitting of the Court.

THIS was an action for an escape against the marshal; and the proof was, that the prisoner, *Serres*, who was in execution in the marshal's custody at the suit of the plaintiff, was seen at large about 11 o'clock on the first day of *Michaelmas* term 1806. The defence was, that *Serres* was out upon a day-rule granted by the Court on the same day; and by the stat. 8 & 9 W. 3. c. 27. s. 1, that could only have been granted at the sitting of the Court, which in fact did not sit till after the time when he was at large. And it further appeared, that the plaintiff had actually filed his bill against the marshal in this action before the sitting of the Court on the same day. The petition of the prisoners in the marshal's custody and the day-rule were admitted at the trial, without formal proof; but were afterwards shewn to be in this form. The petition—"To the Rt. Hon. Lord Chief Justice and the rest of the Judges of his Majesty's Court of King's Bench, *Westminster*—The humble petition of several prisoners in actual custody of the marshal of this court,

"whose names are hereunto subscribed: sheweth that your said petitioners having this day occasion to treat with their several creditors, advise with their counsel and follow their several suits at law, in order to their discharge, humbly pray that they may have leave to go out of prison this day for the purposes aforesaid, and to return again the same day. And your petitioners shall ever pray," &c. (Signed by the several prisoners.) The day-rule runs thus—"Thursday next after the morrow of All Souls, in the 47th year of king George the 3d—England—Upon reading the petition of J. T. Serres, and others, prisoners in the custody of the marshalsea of this Court, this day presented to this Court; thereby praying that the said J. T. Serres might have leave to go out of the said prison for the purposes in the said petition set forth; it is ordered that the said J. T. Serres have leave to go out of the said prison, he returning again into the custody of the said marshal on this day. By the Court." On the part of the marshal, it was contended that the day-rule when granted was a justification to him for the liberation of the prisoner on the whole of the day, by relation back; and that there was no fraction of the day in this case: and that such had been the invariable practice in this respect, which had been recognized by Lord Ch. J. Lee upon a similar occasion. Lord Ellenborough, C. J., before whom this cause was tried at the sittings at Westminster after the last term, was of this opinion: but it was agreed that the plaintiff should take a verdict with nominal damages; reserving leave to the defendant to move to enter a nonsuit if the opinion of the Court should be with him.

The Attorney-General (with whom were Garrow and Topping) accordingly obtained a rule nisi for this purpose at the beginning of the term; when he referred to Sir Thomas Tipping's case, cited in an anonymous case in 1 Stra. 503, where it appears that a *supersedeas* was granted on the motion of a prisoner taken on an escape warrant, who, having signed the petition for a day rule in the morning, had gone out before the Court sat: and they held that being entitled to a rule, that rule would protect him the whole day, and they could make no fraction of a day; though the Court in the principal case refused the *supersedeas*, because the prisoner had not signed the petition till after he was taken up.

Park and Pell, in showing cause against the rule, relied on the stat. 8 & 9 W. 3. c. 27. s. 1, which directs, that if the marshal, &c. or any other keeper of a prison, shall suffer any prisoner to go at large, except by virtue of some rule of Court, "which shall not be granted but by motion made on petition read in open court," every such going out, &c. shall be deemed an escape: and argued that this provision was inconsistent with the practice which had prevailed. That the principal case in Strange seemed to overrule Sir T. Tipping's case there cited; for otherwise, after the rule was once granted, which that case supposes it to have been, it would have related back to the beginning of the day, as well whether the prisoner had signed the petition before, as after he went out: yet the Court there refused the *supersedeas*. They also referred to *Smallcomb v. Buckingham*, Salk. 320, and *Combe v. Pitt*, 3 Burr. 1434, to shew that the Court noticed the fraction of a day in cases of process.

Lord Ellenborough, C. J. It would entirely frustrate the benefit of the day-rule to the parties, if the Court were to construe it thus narrowly and strictly: for if it were first to be moved, and then to be drawn up, and afterwards served upon the marshal, before the party could avail himself of it, he would have the benefit of a very small portion of the day, considering how late the Court usually commence their sitting on the first day of term. We will consider however, that the rule was only granted, as legally it could only have been, when the Court sat on the first day; but when granted, it was a liberty

for that day, and covered the antecedent part of the day; besides, generally speaking, there is no fraction of a day, unless where it is necessary to look to it in order to answer the purposes of justice. We need not, therefore, call in to our aid the case of Sir *Tho. Tipping*, cited in *Strange*, though it appear to warrant our opinion; because that opinion is founded on the general rule of law. And as to the principal case cited in the book, it is no contradiction of the other; because the day-rule is only to be granted by motion made or petition read in open court; and the rule, when made, would not extend to one who had not signed the petition at the time.

Per Curiam,

Rule absolute for entering a nonsuit.

Brandon and Others v. Davis.

9 East, 154. Nov. 27, 1807.

A prisoner under criminal process in the House of Correction cannot be brought up by *habeas corpus ad respondendum*, for the purpose of being charged with a declaration on a bailable writ, and recommitted to his former custody as charged.

SCARLETT moved for a *habeas corpus ad respondendum*, directed to *Aris*, the keeper of the house of correction in *Cold Bath Fields*, (which prison is under the direction of the justices of the peace, and not of the sheriff,) to bring up the body of *Davis*, who was in that prison under sentence for a misdemeanor; the term of his imprisonment not being to expire till the 17th of next *January*: in order that he might be committed to the custody of the marshal, and then charged with a declaration upon a bailable writ issued against him subsequent to his imprisonment, at the suit of *Brandon* and others, and an affidavit to hold him to bail for 2000*l.*; after which it was proposed, that he should be remanded back to his former custody, charged with such action. He referred to *Keach's* case, Salk. 351, and to *Coppin v. Gunner*(a), in which latter case the Court gave leave to charge a felon in gaol with civil process. And in another case of *Lawrence and another v. Laidler*(b), one under sentence for a misdemeanor in *Newgate* was brought up in custody of the gaoler, and committed to the custody of the marshal, in order to be surrendered by his bail; and was afterwards remanded to his former custody

(a) 2 Stra. 878. 2 Ld. Ray. 1572, and vide the case of the bail of *Peter Verger*; 2 Stra. 1217.

(b) This was read from a MS. Note Book of practice furnished by Mr. *Short*, the Clerk of the Rules on the civil side. *Lawrence and another v. Laidler*, 12th Nov. 1758. The defendant being brought into court in custody of the keeper of his majesty's gaol of *Newgate*, by writ of *habeas corpus*; and the defendant being charged by the return to the said writ, that he, having pleaded not guilty to an indictment against him for a misdemeanor, was committed to the said gaol for want of sureties to prosecute his traverse at the next sessions of oyer and terminer for the county of *Middlesex*; and also on reading another writ of *habeas corpus* directed to the Judges of the Palace Court, &c. and the return thereto; whereby it appears, that the defendant was taken on the 31st of October last within the jurisdiction of their court to answer to the plaintiff 15*l.*; and the defendant having put in bail in the said cause on the return of the said writ; and the said bail having this day surrendered the defendant in their discharge into the custody of the marshal; it is ordered, that the defendant be recommitted into the custody of the keeper of the gaol of *Newgate* to answer to his said offence, and to the said action; to be by him kept in safe custody until he shall be from thence discharged by due course of law.

Lawrence and Another v. Laidler. } The defendant being this day rendered in court in discharge of his bail, it is ordered that he be committed into the custody of the marshal, &c. and that an *exoneretur* be entered upon the recognizance; (1) of bail in this cause. 12th Nov. 1758."

There is another precedent in the same book, where the like was done in the case of a prisoner brought up in the custody of the keeper of the *Savoy*. *Bond v. Isaac*, E. 36 Geo. 2. 1767.

(1) If the action be by bill, the order is that an *exoneretur* be entered upon the bail-piece filed in this cause. M. 32 Geo. 2.

charged with the action. [The Court said, that that had only been done in cases where the party was in custody, on criminal process, of the sheriff or gaoler of the Court; but not as in this case where he was in custody of one who was not an officer of the Court.] The statute placing houses of correction under the cognizance of the justice of peace for the imprisonment of offenders could not mean to defeat civil justices by privileging such offenders from being sued till after the term of their imprisonment there expired. It is the acknowledged common practice to have prisoners brought up from such places by writs of *habeas corpus* to be surrendered by their bail; and there is no reason why it should not also be done in order to charge them with a declaration.

Lord ELLENBOROUGH, C. J. The consequence of charging this party with a declaration will be to make the gaoler of the house of correction liable to the plaintiffs in case of an escape. But the Master has mentioned a case to us, where the Court in Lord Mansfield's time refused an application of this sort to bring up a person in the custody of the keeper of Bridewell; saying that this Court had no power to make a gaoler of such prisons liable for the escape of a prisoner on civil process. The only inconvenience from the law, as it stands, is, that during a prisoner's confinement in these places he cannot be sued, when probably a plaintiff could derive no fruit from his suit: and the plaintiff may prevent the statute of limitations running upon his demand by suing out his writ and entering continuances.

Per Curiam.

Rule refused.

Purcell v. Macnamara.

9 East, 157. Nov. 27, 1807.

In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought; and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal; is not material; the day not being laid in the declaration as part of the description of such record of acquittal.

IN an action on the case for a malicious prosecution, the declaration, after stating that on the 18th of Jan. in the 46 Geo. 3. at the *Middlesex* sessions of oyer and terminer, the defendant indicted the plaintiff for perjury alleged to be committed in an affidavit sworn, exhibited, and filed by the plaintiff on the 10th of December 46 Geo. 3. in a cause then depending in Chancery between these parties; the record of which indictment was set forth; and that the same was removed by *certiorari* into this Court; proceeded to allege, that the defendant "prosecuted the said indictment against the plaintiff, until afterwards, to-wit, on the morrow of the Holy Trinity in the 48th year aforesaid, at Westminster, &c. in the Great Hall of Pleas there before Lord Ellenborough, C. J. &c. the plaintiff was in due manner &c. acquitted of the premises charged upon her in and by the said indictment," &c. At the trial before Lord Ellenborough, C. J. at the sittings after last term at Westminster, the copy of the record of the indictment being given in evidence, it appeared by the *postea*, that the trial and acquittal took place "on Tuesday next after the end of the [Easter] term," which was the day of *nisi prius*; before the Lord Chief Justice: whereupon the variance was objected to as fatal; and the case of *Pope v. Foster*, 4 Term Rep. 690, adduced as in point: and on the authority of that case the plaintiff was nonsuited.

But early in this term Gurney moved to set aside the nonsuit, on the ground that the particular day of acquittal was not material to be proved as laid, so that it was prior to the bringing of the action, which it appeared to be from the memorandum of the declaration on the *nisi prius* record compared with

the record of acquittal. And that the declaration did not affect to set out the record of acquittal, according to its tenor; but the day was laid under a *videlicet*. And he cited a case of *The King v. Payne*, (a) tried before Lord Kenyon; C. J. at the sittings at Westminster after Mich. term 29 Geo 3. where an indictment for perjury stated, that "heretofore, to wit, on Monday the 2d day of December, in the 28th year, &c. the cause came on to be tried," &c. And it appeared by the *nisi prius* record, that the jury were respited until, &c. unless the justices, &c. should first come on Thursday the 29th of November, &c. Whereupon it was objected, that the proof varied from the indictment; as the cause must be taken to have been tried on the day mentioned in the *nisi prius* record. But Lord Kenyon overruled the objection; for the day, being stated under a *videlicet*, was not necessary to be proved exactly as laid. He also cited *Brady v. Watson*, 2 Blac. Rep. 1060, where the declaration was for maliciously indicting the plaintiff at the General Quarter Sessions, &c.: and the proof being of an indictment at the General Sessions, &c. the variance was held immaterial. *Rex v. May*, Doug. 193, where an indictment for perjury unnecessarily set out a prior indictment for an assault on which the supposed perjury was committed: but not being set out according to the tenor, but only in manner and form *videlicet*, &c. the prosecutor was held not to be tied down to strict proof of an immaterial allegation in it, as laid. Also *King v. Pippet*, 1 Term Rep. 235, where a variance in stating a precept to the sheriff; and *Frith v. Gray*, 4 Term Rep. 561, where the county in which a certain agreement was to be performed was misstated; were also held to be immaterial. And other cases cited in *King v. Pippet*, particularly *Rex v. Lookup*, where the objection taken and overruled was, that an indictment for perjury upon a bill in Chancery stated the bill to be directed to Robert Lord Henley, &c.; whereas, it was directed to Sir Robert Henley, Knt. &c.; which was contended to be a much stronger case than the present.

The Attorney-General, Garrow, Jekyll, and Abbott, in shewing cause against the rule, relied principally on *Pope v. Foster*, 4 Term Rep. 590, as in point to the present objection: which, they observed, was subsequent to the case of *Rex v. Payne*; and therefore Lord Kenyon, who does not appear to have dissented from the rest of the Court in *Pope v. Foster*, must have changed his former opinion. And they also referred to *Green v. Rennett*, 1 Term Rep. 656, where in an action against an attorney for negligence in not prosecuting a debtor of the plaintiff to judgment; the return of the writ on which the debtor was arrested being laid to be in the 25th year, &c. and the writ itself appearing to have been returnable in the 24th year, &c.; the variance was held fatal; though the day of the return was laid in the declaration under a *videlicet*. And they contended, that the acquittal, being a material fact, was necessary to be proved as laid, and could only be proved by the record: and that the rule, as to matters of proof by record, had always been held very strictly; for otherwise there might be two records.

Topping and Gurney, in support of the rule, denied that the day of the acquittal was material, though the acquittal itself was: it was enough if it appeared to be before the action commenced: if it had only been alleged, that afterwards (i. e. after the indictment) the party was acquitted, that would have been sufficient. In *Green v. Rennett*, the variance was material; because otherwise the negligence of the attorney did not appear; and on that ground only the Court decided the case. The strictness of the rule, as to proof by matter of record, only applies where the tenor of the record is undertaken to be set out: but here the substance only of it is alleged; and the very day cannot be material; because the record itself does not state the fact truly in this respect. They again relied on the cases formerly cited.

Lord ELLENBOROUGH, C. J. This nonsuit proceeded on the authority of *Pope*

(a) This was read from a note taken by Mr. Holroyd.

v. *Foster*: if that case be law, the nonsuit ought to stand: if it be not, both that case and this nonsuit must fall together. There are two sorts of allegations: the one of matter of substance, which must be substantially proved; the other of description, which must be literally proved. The question is, whether this be an allegation of the former sort. The allegation is, that the plaintiff was prosecuted "until afterwards, to wit, on the morrow of the *Holy Trinity*, in the 46th year aforesaid, &c. she was in due manner acquitted." The substance of the allegation is no more than that the plaintiff was acquitted upon that prosecution: and to support this action it must also appear that she was acquitted *before* the action was brought. The day of acquittal is not alleged with a *prout patet per recordum*: the averment is, that the acquittal took place on the *morrow of the Holy Trinity*, when the record produced states that it took place on *Tuesday next after Easter term*; and certainly there would be a repugnancy between the allegation and the proof, if it were to be considered as a specific allegation of time: but if it be only taken as a substantial allegation of the fact of the acquittal, as of a time which is shewn to have been before the action brought; then the repugnancy is immaterial, and the proof in substance supports the allegation. And so it appears to me to do. If it had gone on to state that the acquittal was on a certain day *as appears by the record*; that might have been considered as descriptive of the record, and then the variance would have been fatal. The ground therefore on which I consider that the case of *Pope v. Foster* ought not to bind us, as having been decided against principle, is, that this is an allegation of substance and not of description. And this distinguishes it from *Green v. Rennett*, which was a case of description: it described the writ in terms; when sued out, and when returnable; and the return of the writ was part of the description of the thing alleged, and could only be proved by the production of a writ so returnable. That case, therefore, was rightly decided: and so it appears to me was that of *The King v. Payne*: where a better opinion was delivered than in *Pope v. Foster*, which passed without discussion.

GROSS, J. I remember the case of *Pope v. Foster*, which was not argued, but on the first statement at the bar Lord *Kenyon* and my Brother *Buller* conceived that there was no ground for a new trial. It appears now that Lord *Kenyon* not long before had been of a different opinion in *The King v. Payne*; and upon principle I think that that case is the most fit and convenient to be adhered to. The good sense and substance of the allegation is, that the acquittal took place at such a time as to give the plaintiff her cause of action.

LAWRENCE, J. I think that the case of *Pope v. Foster* was wrongly decided. Where the day laid is made part of the description of the instrument referred to, which instrument is necessary to be proved, the day laid must be proved as part of that instrument. But where the day laid is not material in itself, and need not have been proved as laid, supposing the proof to have been by parol; if the fact proved will support the declaration, I see no ground for any distinction between making such proof by matter of record or by parol. The case of *Pope v. Foster* is certainly in point to the present objection; but it seems to have proceeded on some misunderstanding, as if there had been an attempt to introduce evidence of the real day of the trial and acquittal in order to *contradict the record*, which proved them to have been on a different day. But that was not the true state of the case. The material fact which the plaintiff had to prove was his acquittal before his action commenced; in order to prove the acquittal, the record was produced; on reading which, the objection was made on the part of the defendant, that it stated the acquittal on a day different from that laid in the declaration. But if the acquittal appeared to have been on a day prior to the bringing of the action, that was all which it was necessary for the plaintiff to prove; and therefore there was no contradiction of the record. It was no more necessary, to prove the precise day of the acquittal, as laid in the declaration, than it is

upon an indictment for murder, or in a declaration upon promises, to prove the precise day laid of committing the murder, or of making the promise. The case of *Green v. Rennett* turned upon the materiality of the *return day* of the writ, as described in the declaration. On the production of the writ it appeared to have been sued out and returnable on different days from those laid in the declaration. It was first objected that the day of suing it out was material; but that was overruled at the trial by Mr. Justice *Buller*: but he said that the return day was material, and therefore nonsuited the plaintiff on the variance in that respect. Now, the return day was material there, because it was part of the description of the writ stated in the declaration, which could only be proved by the production of a writ so returnable. Then the case of *The King v. Payne* is as much in point, in answer to the objection, as that of *Pope v. Foster* is in support of it. And the former was not mentioned when the latter was decided. And in *The King v. Lookup* the variance was much stronger than in this case: but yet it was thought sufficient that the complainant had preferred a bill before the person who held the great seal, whether he were styled Lord *Henley* or Sir *Robert Henley*. It is sufficient, however, to dispose of the objection in this case, that the day is not alleged as part of the description of the record of acquittal. The acquittal might have taken place on that or on any other day prior to the plaintiff's action; which it was proved to have been; and that was all which it was material for him to prove in respect to time.

LE BLANC, J. We have been pressed with the case of *Pope v. Foster*; and if that had been solemnly discussed, and a rule of evidence there laid down which had been acted upon ever since, the Court might have found themselves distressed by that authority, and it would have been difficult to have gotten rid of it. But it appears that a different rule of evidence had been before that time laid down by the same learned Lord who presided here when *Pope v. Foster* was determined; and no reference was then made to the former decision; but the latter case passed without discussion: and the question seems to have been brought before the Court embarrassed a little, as it seems, with the idea that evidence had been offered to contradict the record as to the day of the acquittal. But that was not so; for the only material part of the allegation in the declaration was, that the plaintiff was acquitted before the action brought; and it was immaterial on what day before: and the record was only produced to prove the acquittal. And I cannot see any reason why, where a fact is not material to be alleged on the exact day, and need not be proved exactly as laid, and the allegation of the day is not particularly descriptive of the record referred to: that it should become material, because it appears by matter of record instead of by parol evidence.

Rule absolute(1).

(1) Vide Post 361.

Manning and Others v. The Commissioners of Compensation under the West India Dock Act.

9 East, 165. Nov. 28, 1807.

The compensation clause, s. 121. of the stat. 39 Geo. 3. c. 69. directing that in case any warehouses, &c. (used for holding *West India* produce before that act) should be rendered *less valuable* by reason of the *W. I.* trade being diverted therefrom by the then intended *W. I.* docks and works, than they were *before the passing of the act*; or in case the *yearly or other receipts of Christ's Hospital*, should be thereby lessened; the owners of such warehouses, &c. and the Governors of the Hospital should be compensated; (thereby putting such owners and governors on the same footing) must be construed with reference to the *yearly profits made of the premises antecedent to the passing of the act*; and the *value* of such warehouses cannot be evidenced by the *yearly profits made between the passing of the act and the opening of the docks*, by which latter the loss was occasioned.

THE stat. 39 Geo. 3. c. 69., establishing the *West India Dock Company*, and enabling them to make wet docks and build warehouses and other works in the *Isle of Dogs*, to which the *West India* trade and shipping were to be removed from the quays, wharfs, and warehouses higher up the river, which were before frequented by the trade; by s. 121, reciting that in consequence of the works intended by the act, "some of the present legal quays, &c. and certain warehouses, docks, and divers other tenements and hereditaments in or adjoining the port of *London*, some of which warehouses were known by the name of *Up Town* warehouses, and used for the reception of *West India* produce and other goods landed, *might perhaps become less valuable*, by means of the trade or business of the same respectively being in part diverted, *than the same respectively are at present*;" and divers owners and occupiers of, and other persons interested in, &c. such legal quays, &c. warehouses, docks, and other tenements, &c. *may thereby sustain loss or damage*; and the *yearly and other receipts* of the Governors of *Christ's Hospital* in the city of *London*, for or on account of the car-rooms, or figures for using free carts within the said city, &c. *may also thereby happen to be lessened*;" enacts, "that in case such legal quays, warehouses, &c. or any of them, shall, by reason of the said intended works, &c. be rendered *less valuable* by reason or means of the trade thereof being diverted therefrom *than they respectively were before the passing of this act*;" or any owners or occupiers of the same legal quays, warehouses, &c. shall, by reason of any of the same works, suffer loss or damage; or the *yearly or other receipts or income* of the Governors of *Christ's Hospital* aforesaid, for or on account of car-rooms, shall, by reason of any of the same works, happen to be lessened, the Commissioners of Compensation (appointed by the act) shall make such just and liberal compensation or satisfaction, &c. to the owners or occupiers, &c. of the same legal quays, warehouses, &c. *so rendered less valuable respectively*, and to the Governors of *Christ's Hospital*, &c. as shall be agreed upon between the said commissioners and such respective owners," &c. And by s. 122. If any person claiming compensation shall not agree with the commissioners as to the amount of it, and shall persist in their claim, the commissioners are to issue a precept to the sheriffs of *London* or of the county, &c. where the premises lie; who are to return a jury at the time and place appointed: which jury is to award the amount of the compensation, and their verdict is to be final; and by s. 127, it is to be entered amongst the records of the General or Quarter Sessions, &c. The stat. 46 Geo. 3. c. 132. further regulates the trial of claims for compensation, which are to be before the justices at sessions. And by s. 9. reciting that questions of doubt and difficulty may arise as well concerning the title of claimants to compensation as the amount of the sum claimed, the justices are enabled "to reserve any

"point of law arising upon such trial for the consideration of the Court of K. B. upon motion to be made in the same court, in the same manner as if such point had been reserved by the Lord Chief Justice at *nisi prius*," &c.

The plaintiffs were the owners of a warehouse, which had been used by them for the purpose of receiving *West India* produce before the passing of the act in question, and for which a considerable rent was received; and this rent had progressively increased, owing principally to the increasing importation of colonial produce into the port of *London*, and the consequent increased demand for warehouse-room, from a period of about four years before the passing of the act in 1799 till the opening of the docks in 1802, when their profits ceased, in consequence of the removal of the trade to the company's docks and warehouses. And the Commissioners of Compensation having rejected their claim for compensation for this loss by reason of the dock works, it came on to be tried in the form directed by the act before the Recorder of *London*, and a jury, at the adjourned Quarter Sessions for the city, holden at the *Guildhall*; when the claimants' title to some compensation being established in evidence, a question of law arose respecting the time from which the average of the *value* of the premises, in respect of which compensation was claimed, should be calculated back; viz. whether in estimating such *value* the jury were confined to take an average upon the *actual profits* made of such premises for one or more years *prior* to the 12th of *July* 1799, when the *West India Dock* act, 39 Geo. 3. c. 69, passed; or whether in estimating such value, it were lawful for the jury to take into their consideration the then *value* of the premises *evidenced by the actual profits* made *subsequent* to the passing of the act? The Recorder instructed the jury not to take into their consideration any evidence of the *profits* made of such premises *subsequent* to the passing of the act, but to confine their attention to the consideration of the *profits* made of them *prior* to that act. The jury calculated the compensation according to this direction, and assessed the plaintiff's damages at £. Early in this term a rule *nisi* was obtained for setting aside the inquisition and having a new assessment of damages; upon an affidavit of the plaintiffs' claim and of the trial had, and that the question of law above stated had been reserved by the Court, as permitted by the act of parliament. And afterwards the Recorder made his report of the question of law reserved in the terms above-mentioned.

The case was argued by *The Attorney-General*, *Garrow*, *Dampier*, and *Roe*, against the rule for a new inquisition; and by *Best*, *Serjt. Parry*, *East*, and *Watson*, in support of it. And two days after

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court.

This was a motion for a new assessment of damages, upon the ground of a supposed misdirection of the Recorder of *London* in respect of the construction of the compensation clause in the *West India Dock* act, 39 G. 3. c. 69, s. 121. 122. (After stating s. 121.) Upon considering the terms of this clause we think there is no reason to suppose that the Legislature meant to put the Governors of *Christ's Hospital*, therein mentioned, and any other owners of property and persons entitled to compensation under this section, for loss or damage sustained in respect of the other descriptions of property therein also mentioned, upon a different footing. The governors of *Christ's Hospital* are under this section entitled to no compensation, unless their *yearly receipts*, (which must be understood as their *yearly receipts before the passing of that act*) should be diminished. However they might increase between the time of passing the act, and however they might fall off afterwards; unless it should have the effect of producing a diminution of the receipt, so as to reduce it below the sum they *produced at the time of passing the act*: they could have no claim. From hence it appears to follow that, as the Governors of *Christ's Hospital* could have no compensation on account of the prospective increase of their receipts or income, and their subsequent

diminution; the owners of quays, wharfs, warehouses, &c. put on the same footing with them can also have no compensation, on account of the prospective increase of value in their property. And that the words of the act, "*less valuable*," must therefore be understood as meaning the same as the words "*less productive*." If the subsequent profits are allowed to be calculated upon, it will in effect be to adopt and proceed upon a calculation of the value *at the time of the claim*, instead of the value as taken before the passing of the act; which is the standard of valuation expressly adopted and referred to by the act itself. Nor does the postponement of the period for making or admitting claims for compensation, (under sect. 128.) "until the expiration of three years after notice of the docks and dock premises being ready for use," appear to us at all to warrant, as has been argued, a contrary construction of the act; the obvious purpose of this provision being only to allow a sufficient interval for the accumulation of the fund out of which the compensations allowed by the act should be made. It appears to us, therefore, that the direction given to the jury by the Recorder has been correct in point of law, and that there is no ground for granting a new inquisition.

Rule discharged.

Josiah Perrin and Maria Perrin, Infants, by Joseph Perrin, their Father and next Friend v. Thomas Lyon, W. D. Evans, Joseph Perrin, Wm. Geddes, and Archibald Geddes.

AND

Tho. Lyon v. Wm. Geddes, Archibald Geddes, Maria Perrin, Josiah Perrin, W. D. Evans, and Joseph Perrin.

9 East, 170. Nov. 20, 1807.

J. P. devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education and support of his only daughter, until she should attain the age of 21 years, or marry; and when she should attain 21, or marry, then to her in fee; but in case his daughter should die under age and unmarried, then the estates to go to his wife for life; and, after her decease, to the two children of his nephew, as tenants in common in fee; with a proviso that if either his wife or daughter should marry a Scotchman, then his wife or daughter so marrying should forfeit all benefit under his will, and the estates given to such his wife or daughter as should so marry should descend to such person or persons as would be entitled under his will in the same manner, as if his wife or daughter were dead. Held that such partial restraint of marriage was legal; and that the daughter having while under age married a Scotchman, and died, leaving a son; such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the two children of the testator's nephew (which nephew was still living) took effect immediately on such marriage; they being the persons designated by the will to take in the event which had happened; the testator having considered such prohibited marriage the same as the death of his daughter under age unmarried.

ON the hearing of these causes before the Lord Chancellor, his Lordship directed a case to be stated for the opinion of this Court, in substance as follows:

Josiah Perrin of Warrington in the county of Lancaster, being seised in fee of a considerable real estate, by his will dated the 22d of Oct. 1795, duly executed and attested to pass real estates; after directing his debts, &c. to be paid by his executors, and bequeathing to his wife the share in the glass-house concern which he had in her right, and also all his household goods, &c. de-

vised as follows : " I give, devise, and bequeath unto my executors hereinafter named, their heirs, executors, &c. all and every my real and personal estates whatsoever and wheresoever not hereinbefore disposed of, upon trust in the first place to pay unto my wife one annuity of 100*l.* during her life, &c. in full of all dower, &c. And upon further trust to stand possessed of the residue of the rents, issues, and profits of my said real and personal estates, and put out the same to interest, &c. and pay thereout to my niece *Mary Falkner* 200*l.*, to be paid and applied for her use by my executors in such manner as they shall think proper; and to stand possessed of the residue of my effects, and pay thereout for the maintenance, education, and support of my daughter *Sarah Perrin* such sums of money as shall be sufficient for that purpose; considering the fortune she will be by this my will entitled to; *until my said daughter shall attain the age of 21 years, or marry, which shall first happen.* And when my said daughter shall attain her said age of 21 years, or marry, then I give, devise, and bequeath all and every my said real and personal estates, charged with the said annuity to my said wife as aforesaid, unto my said daughter, her heirs, executors, &c.: *but in case my said daughter shall depart this life under age and unmarried,* then I give, devise and bequeath all and every my real and personal estates, charged as aforesaid, unto my wife, during the term of her natural life; and after her decease, unto the two children of my nephew *Joseph Perrin*, their heirs, executors, and administrators, equally as tenants in common, and not as joint-tenants. Provided always, and it is my express will and desire, and I do hereby solemnly order and declare, that *if either my said wife or daughter shall intermarry with any person born in that part of Great Britain called Scotland, or born of Scotch parents,* then and from thenceforth my said wife or daughter, so marrying, shall forfeit all the benefit and advantage under this my will; and my said real and personal estates, or such part thereof as shall be given to such of my said wife or daughter as shall so marry, shall descend to such person or persons as would be entitled under this my will, in the same manner as if my said wife or daughter were dead; any thing herein contained to the contrary notwithstanding." The testator appointed his wife and *Thomas Lyon* his executors, and guardians of his daughter during her minority; and died in *May* 1796; leaving *Sarah Perrin* his daughter and only child and heir at law, who was then 12 years old, and *Cath. Perrin* his widow, and *Josiah Perrin* the younger, and *Maria Perrin*, the plaintiffs in the first-mentioned cause, the only children of his nephew *Joseph Perrin*; who were living when the testator made his will. On the 13th of *July* 1802, *Sarah Perrin* (the daughter) being then under the age of 19 years, intermarried with the defendant *Wm. Geddes* of *Warrington*, merchant, who was born in *Scotland* and of *Scotch* parents. *Catherine Perrin* (the widow) died on the 5th of *February* 1803. *Sarah* (the daughter) died on the 5th of *July* 1803, and before she attained the age of 21 years; leaving the defendant *Archibald Geddes* her only child and heir at law; who, upon her death, became the heir at law of the testator *Josiah Perrin*: but in case she had never been married, or had not had any issue, *Joseph Perrin* the defendant would be her heir at law, and on her death would have become the heir at law of the testator *Josiah Perrin*. The question was, Who, under the circumstances, was entitled to the real estates of the said *Josiah Perrin*?

Littledale, for the plaintiffs in the first cause, contended that the infant children of *Joseph Perrin* were entitled under the will to the real estate: it being given over to them in the event which had happened of the testator's daughter having married a *Scotchman*. First, as to the legality of the proviso in restraint of such a marriage: though by the civil and canon laws restraints of marriage are in general discouraged and held void: yet even those laws admit of exceptions to the general rule, *Swinb.* part 4. sec. 12, as if the

condition be only temporary, as not to marry before the age of twenty : or if it only exclude marriage with particular persons, as a widow, or a certain person by name ; or in a particular place, as in *York* ; or if one be made executrix with a certain benefit, so long as she remains unmarried. All the principles and cases applicable to pecuniary legacies in our law, as derived from the civil law, are fully illustrated in the case of *Harvey v. Aston*, Com. Rep. 726. 735. &c. ; and these and other partial exceptions are shewn to have been allowed ; especially where there is a devise over in the event of the prohibited marriage. But restraints of marriage have always been admitted by the law of *England* in devises of real estate, and *a fortiori* where there is a devise over, as in this case. As in *Williams d. Porter v. Fry*, (a), *Booth v. Booth*, 2 Chan. Cas. 109, *Harvey v. Aston*, 1 Atk. 361. Cas. temp. Talb. 212. Com. Rep. 726. Willes, 83, *Reymish v. Martin*, 3 Atk. 330, *Scott v. Tyler*, 2 Bro. Ch. Cas. 431, and 2 Dicken's Rep. 712, and *Stackpole v. Beaumont*, 3 Ves. jun. 89 : all which cases establish the distinction, that restrictions of marriage upon pecuniary legacies are governed by the rule of the civil and canon law, which in general repeals such restrictions : but upon devises of land, or even charges on land, they follow and are upheld by the law of *England*. It cannot be said, as in some former cases, that the prohibition of marriage with a *Scotchman* was merely *in terrorem* ; for that argument has never been admitted where there is an immediate devise over ; though where the devise over was not to take till a certain age, and the first devisee married before the other arrived at that age, in the case of *Doe v. Freeman*, 1 Term Rep. 389, the first devisee was held to take an absolute estate, notwithstanding her prohibited marriage, until the devisee over attained to the specified age. There are, however, many authorities in our books, which support a general prohibition of marriage to different persons upon pain of forfeiting their estate. As in 14 Vin. Abr. 16. tit. Gavelkind, (D), pl. 4. and Co. Lit. 30. a. note 1. If a wife seised of gavelkind land die without issue by her husband, he shall be tenant by the curtesy of half the land *so long only as he shall continue unmarried*. So a rent may be granted to determine upon marriage. C. Lit. 180. b. So fellowships of colleges are avoided upon marriage ; though some of these, such as *Emanuel* and *Sydney* colleges, have been founded since the Reformation ; and this restriction depends on the wills of the founders. Co. Litt. 234 b. commenting on the words *Durante* and *dum*, says, they are properly words of limitation, as where an estate is granted *durante viduitate* or *virgenitate* ; or where a lease is made *dum sola fuerit*, or *dum sola et casta vixerit* ; and so is 1 Roll. Abr. 418. Condition X. pl. 6. In *Robinson v. Comyns*, Cas. temp. Talb. 164. 2 Eq. Ca. Abr. 215. 393, the devise was on condition that the devisee married the testator's grand-daughter ; and no doubt was entertained of the validity of it ; though Lord *Talbot* thought that the grand-daughter refusing to marry the devisee was a dispensation of the condition. In *Scott v. Tyler*, 2 Dickens, 721, Lord *Thurlow* enumerates many restrictions which were even allowed by the civil law : the accuracy of which list, as far as it goes, was confirmed by Lord *Loughborough* in *Stackpole v. Beaumont*, 3 Ves. jun. 97. Lord C. J. *Willes*, in *Harvey v. Aston*, Willes, 94, even seems to consider that the law of *England* admits of a devise under a general restriction of marriage ; and instances that a devise of an estate *durante viduitate* is certainly good. And in *Fry v. Porter*, 1 Mod. 300, and *Booth v. Booth*, 2 Chan. Cas. 109, a condition in restraint of marriage generally, without consent, with a limitation over was clearly considered to be valid. But it is not necessary to contend that a devise on condition of a general restraint of marriage is good : it is enough that all the cases agree in support of a reasonable restriction of that kind ;

(a) 1 Mod. 86. 300. 1 Chan. Cas. 142. or 2 Chan. Rep. 26. 2 Lev. 21. T. Ray. 286. 1 Ventr. 199.

and there is nothing unreasonable in the restriction in question. There can be nothing unlawful in restraining the object of a testator's bounty from marrying with particular persons by name, or with the inhabitants of such a town, even in his own country; for bonds in restraint of trading or carrying on any business in a particular town or district have been held good. *Davis v. Mason*, 5 Term Rep. 118, and *Bunn v. Guy*, 4 East, 190. A restraint then of marrying any foreigner of a particular country is at least as reasonable; or against marrying one of a different religion: and this will apply as well to *Scotland*, the established religion of which is different from the church of *England*, and the country governed by a different law, though united under the same crown. Secondly, the condition in question is good on another ground; for the devise to the daughter was when she should attain 21 or marry: therefore as soon as she had attained 21, the estate would have become absolute in her in fee, and not liable to be divested by any marriage she might subsequently have contracted: the restraint of marriage therefore with a *Scotchman* only operated upon her till 21; and all the authorities agree that such a restraint is good. That the estate would have vested in her absolutely at 21, if she had not married before, appears from *Desbody v. Boyville*, 2 Pr. Wms. 547, where a legacy was to be paid to a daughter when she attained 21, or be married with the consent of A. and B.; but in case she married without such consent, the executors were only to pay her the dividends during her life; and after her death to transfer the stock to her children, &c.: and it was held, that the condition determined at 21: and the same point was ruled in *King v. Withers*, 1 Eq. Ca. Abr. 112. Prec. in Chan. 348, and *Pullen v. Reddy*, 2 Atk. 587. Thirdly, in the event of the prohibited marriage the estate is directed to "descend to such person or persons as would be entitled under his will in the same manner as if his daughter were dead." Now, in case of the decease of his daughter "under age and unmarried," (by which latter must necessarily be understood *unmarried to any person not prohibited by him*) the testator had before expressly devised the estate over to the two children of his nephew *Joseph Perrin*, as tenants in common, in fee. He evidently considered his daughter's marriage with a *Scotchman* as equivalent to her death unmarried: otherwise that which was to give effect to the limitation over would be made to defeat it: it would be *feilo de se*. In case of the natural death of the daughter without issue, it would descend at common law to *Joseph* the father of the infants; but the testator has expressed what descent he meant, namely, that pointed out under his will, which is to his infant great nephews.

Park, on behalf of *Joseph Perrin*, (who would have been the testator's heir, if his daughter had died without issue,) argued that he would take if the limitation over were good; which he also contended that it was; and referred to *Pulling v. Reddy*, 1 Wils. 21, where the rule is laid down that if a legacy be devised on condition of marriage with consent, and there be no devise over in case the party marry without consent; this is only considered in *terrorem*: but if there be a devise over, it shall go to such devisee. But if the portion arise out of land, where there is no devise over, it shall go to the heir. Now the words of this will are that in case the daughter shall so marry, (*i. e.* a *Scotchman*, the real and personal estate "shall descend to such person or persons as would be entitled under this my will, in the same manner as if my daughter were dead." But it was only given over before to the infant children of *Joseph Perrin* in case the daughter should die under age and unmarried; both those events must concur; and in order to satisfy those words *Mr. Littledale* is obliged to add (unmarried) "within the meaning of my will," *i. e.* "to any other than a *Scotchman*:" whereas construing the words used in their plain and grammatical sense, without addition or subtraction, the person to whom the estate would descend, if the daughter had died under age and unmarried, would be *Joseph Perrin*, who would then have stood in the place

of heir at law to the testator and to his daughter. And by this construction an effect is given to every word ; for the estate would descend to *Joseph Perrin under the will*, and, in no other way, since the prior claims of the testator's daughter and her children are by that alone put out of the way of his claim *by descent*.

Holroyd, for the defendants, contended that *William Geddes*, the father, was entitled as tenant by the curtesy for his life, with remainder in fee to his son *Archibald* : or, if not, that the whole fee vested presently in the son. First, the testator's daughter took a vested estate in fee, and it did not remain contingent until her marriage or age of 21 : nor was there any condition precedent, to prevent the fee vesting in her until the condition was satisfied. It is a devise to trustees of real and personal estate, in the first place, to pay an annuity to his wife ; next, to pay for the maintenance and education of his daughter until her age of 21 or marriage ; and *when she attained 21 or married*, then to her in fee : but if she died under age and *unmarried*, then he gave it over. A devise to one *if or when* he attains such an age vests immediately, though the estate be devised over if he die before. But here there is also a devise of maintenance to the daughter out of the estate until her age of 21 or marriage ; the trustees therefore merely took the management of the estate in the mean time as guardians. *Stoker v. Edwards*, 2 Show. 391, *Edwards v. Hammond*, 3 Lev. 132., *Manfield v. Dugard*, 1 Eq. Cas. Abr. 195, *Goodtitle v. Whitby*, 1 Burr. 228, *Denn v. Statterthwaite*, 1 Blac. Rep. 519, *Doe v. Underdown*, Willes, 293, and *Bromfield v. Crowder*, 1 New Rep. 313, all shew that the fee vested in the daughter in the first instance, liable only to be divested if she died before 21 and unmarried, or on the happening of any other *legal* condition which the testator might afterwards impose : which is very different from the case where the estate is only given to the devisee upon the happening of a particular event ; as if the daughter married *A. B.* : there the marriage, or other event, on which the estate is so given, is a condition precedent, which, however illegal in itself, must take place before the estate can vest in the party. This distinction will explain what was said by Lord *Thurlow* in *Scott v. Tyler*, 2 Bro. Ch. Cas. 488, as to the difficulty of reconciling all the cases. As where an estate is given to a widow *durante viduitate* ; if she marry again, the Court cannot give her the estate any longer, because the condition of her widowhood is the only tenure by which she holds the estate. The same distinction will apply to the cases cited, of gavelkind, and of fellows of colleges. Admitting, therefore, the distinction which has been taken between the civil and canon law, and the law of *England* ; that the former avoids in general all restraints of marriage ; and that the law of *England* has adopted that rule only with respect to pecuniary legacies, but not as to real property ; (though it is observable here that the devise of the personal is joined with that of the real estate, still if the estate once vested, as the authorities shew, in the daughter, the Court will not suffer it to be divested upon an illegal condition : and Lord C. J. *Wilmot*, in *Low v. Peers*, *Wilmot*, 369, 370, 4., takes the same distinction, while he condemns generally all restraints of marriage as contrary to the policy of the law ; and he shews that the case in the Year-book 43 Ed. 3. 6. a. from whence the dictum in 1 Rol. Abr. 418, is taken, is against the legality of the restraint ; and refers to the opinion of Lord *Hale* in *Fry v. Porter*, 1 Mod. 308, for the reason given by him for supporting conditional limitations, (founded on prohibitions of marriage without consent,) " because the party is not thereby bound from marriage." The question then is, whether the restraint in question, which applies both to the wife and daughter, be void, as being too general ? This is not at all affected by that class of cases legalizing covenants in restraint of trade in particular districts ; for they are founded upon adequate consideration commensurate with the restraint ; namely, the proportionate benefit of the covenantee in the same trade or call-

ing: and it is indifferent to the public whether *A.* or *B.* exercise their business in any particular place. But this is a restraint extending to a whole nation, and that too forming an integral part of the kingdom. If the restraint went to every person in *England*, it would clearly be void upon general principles of policy, as laid down by Lord C. J. *Wilmot* in *Low v. Peers*. Then why should not the same principles extend to *Scotland*? The fact of the testator's having resided in *England* cannot affect the question of policy. Suppose that the daughter had married a person whom she had reasonable ground to believe was born of *English* parents in *England*; yet if in fact he were a *Scotchman*, though unknown to her, the forfeiture would still be incurred however innocently; which shews the unreasonableness of so general a restraint. The restraints which have been supported in particular cases, such as having the consent of parents or guardians, &c. were considered more as regulations to prevent improvident marriages: but this goes to restrain marriage whether provident or improvident; which is unreasonable, and on that account injurious to the interest of the public, which is concerned to promote provident marriages, or at least not to prohibit them. The case of restraining marriage with a person of a different religion is distinguishable, not as a restraint, but as a regulation of marriage: the difficulty of determining in what faith the children are to be brought up, and the domestic disputes consequent thereupon, may class this under the latter head. There may also be a distinction on the ground of public policy between prohibitions of marriage with a foreign nation, and with a nation forming part of the kingdom. On these grounds this condition would be void: and *William Geddes* would be entitled as tenant by the curtesy. But if not, secondly, the estate is not given over to *Joseph Perrin* as heir at law, (supposing the testator's daughter had in fact died unmarried) nor to his children; for it is only given over in the event of the daughter's "marrying a *Scotchman*, &c. and then it is to "descend to such person or persons as would be entitled under my will in the same manner as if my wife or daughter were dead; any thing herein contained to the contrary notwithstanding." The daughter therefore having left a child, it must descend to that child. This being the case of a forfeiture, the condition must be taken strictly. In a MS. common place book of Judge *Dodderidge*(a) it is said, "conditions that go in defeazance shall be taken strictly, for they are odious." It is also to be taken strictly as being in restraint of marriage, according to the opinion of Lord *Mansfield* in *Long v. Dennis*, 4 Burr. 2055. The construction contended for will also disinherit the heir at law, which can only be by express words or necessary implication. The estate is directed to descend as if the daughter were dead: this can only be to her son, who is her heir; and it cannot descend to any person except as heir of the person last seised; and no heir can take by descent in the life of his ancestor. [Lord *Ellenborough*, C. J. The word *descend* cannot be taken here in its strict sense, because it is applied to personalty as well as realty. The testator only meant that the estate should go over to the haeres factus in the event which he provided for.] Then being limited over as if the wife or daughter were dead; as applied to the daughter, it would go to her son. But the words "entitled under this my will" are relied on as referring to the limitation antecedently expressed: but that was only to take place in case his daughter should die under age and unmarried. Now the condition of dying under age could not apply to the wife, who was above age when the will was made; as to her therefore it could only operate as a condition *in terrorem*; then why should not the other condition of dying unmarried operate in *terrorem* also as to the daughter. Taken in the strict sense of the words, the event has not happened on which the estate was to go over; for the daughter did not die "under age and unmarried."

(a) Cited in *Scott v. Tyler*, 2 Bro. Chan. Cas. 456.

Littledale in reply contended that the estate never vested in the daughter, but was in the trustees, who were to pay the widow's annuity out of it; to raise 200*l.* for the niece; and to provide for the education and maintenance of the daughter till she attained 21 or married; and the sums necessary for the latter purposes were to be estimated by the trustees considering the fortune she *would be* entitled to: therefore till 21 or marriage the testator did not consider his daughter as entitled to any thing. But if the estate did vest in her in the first instance, it was liable to divest if she died *under age and unmarried*; and then as the prohibited marriage with a *Scotchman* operated by the necessary construction of the will as a death, by the express direction of the testator; it follows that the estate was divested out of her, as upon her dying under age and unmarried, in which event the limitation over to the children of *Joseph Perrin* was to take effect. And then the only question is upon the legality of the condition; which is not like cases of contracts between parties stipulating against the marriage of one of them, such as *Low v. Peers*; but turns on the power which every man has to annex what condition he pleases to his bounty. And this is as much a regulation of marriage as any of the cases, admitted to be law, where devises on condition of marrying with consent have been held binding.

Lord ELLENBOROUGH, C. J. said, that the Court would certify their opinion; but he saw no ground for holding this condition to be void, as being in general restraint of marriage. And afterwards the following certificate was sent:

"Having heard this case argued by counsel, and considered it, we are of opinion, that under the circumstances of the above case *Josiah Perrin* and *Maria Perrin*, the two children of the testator's nephew *Joseph Perrin*, are entitled to the real estates of the said testator *Josiah Perrin*.

23d January, 1808.

ELLENBOROUGH.
N., GROSE.
S. LAWRENCE.
S. LE BLANC."

CASES

IN

HILARY TERM,

IN THE FORTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

Kingsmill, Bart. and Another v. Bull and Another.

9 East, 185. Jan. 25, 1808.

Where a plea of justification in trespass for taking two horses as heriots, stated a custom in the manor that the lord from time immemorial, until the division of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seised; and since the division the lord had taken and been accustomed to take on the death of every tenant dying seised of either of the moieties a heriot for each moiety: this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement before, and the other after the division of it: and being laid to be an immemorial custom, it is disproved by evidence that the division was made within memory.

IN trespass for taking the plaintiffs' horses, the defendants pleaded several justifications of the taking, as servants to the Earl of Caernarvon, lord of the manor of *Eckinswell* in the county of *Southampton*, for heriots due on the death of Sir Robert Knigsmill, Bart. the plaintiffs' testator, in respect of certain customary tenements of the manor of which he died seised. And as to the seizing of two of the horses, they alleged by their 21st plea, that at the death of Sir R. K. the last tenant, the Earl of Caernarvon was and still is lord of the manor of E.; that one messuage, &c. from the time immemorial until the division thereof into moieties, was parcel of the manor, and a customary tenement thereof demised and demiseable by copy, &c. according to the custom of the said manor; and that continually from the division thereof into moieties hath been and still is parcel of the said manor, demised and demiseable by copy, &c. The plea then stated the following custom, upon the manner of stating which the question arose. "That within the said manor there now is, and from time whereof, &c. hath been an ancient custom there used and approved, viz. that the lord of the said manor for the time being, from time whereof the memory of man is not to the contrary until the said division of the last mentioned customary tenement into moieties, hath seized and taken, and been used and accustomed to seize and take, and during all that time of right ought to have seized and taken, upon the death of every tenant dying seised, &c. for and in respect of such tenement; and since the said division the lord of the said manor for the time being hath seized and taken, and been accustomed to seize and take, and still ought to seize and take, after the death of every tenant dying seised of the said moieties, or either of them, in respect of each such moiety whereof he hath so died seised,

one of the beasts which were of such tenant at the time of his death, for and in the name of a heriot custom," &c. The plea then stated the admission of the last tenant, his death, and the seizure of the two horses as heriots. Replication—*de injuria sua propria*, and traversing the custom in the words of the plea. At the trial before *Thomson, B.* at the last assizes at *Winchester*, it appeared in evidence upon the 21st plea, that the division of the tenement therein mentioned was made *since the time of legal memory*; and the question made at the trial upon the construction of that plea was, whether it confined the division of the tenement to time beyond legal memory, or not? And a verdict was taken by the Judge's direction for the defendants on this, as well as upon certain other pleas; and for the plaintiffs upon the rest; with liberty for the plaintiffs to move to enter a verdict for them on the issue in question, and to add 4*l.* 10*s.* (the agreed value of the two horses) to the damages found for them on the other pleas, if the Court should be of opinion with them upon the construction of the 21st plea. The motion was accordingly made, and a rule *nisi* granted in the last term for this purpose; against which

Lens, Serjt. and *Gaselee* now shewed cause, and contended that the evidence supported the substance of the plea; which did not necessarily import that the division of the tenement was before the time of legal memory: but it might be read either way. And they pointed the attention of the Court to the different manner in which the custom was laid as used and approved *before* the division of the tenement, and *since*: the allegation of its existence *from time whereof*, &c. only applied to it *before* the division; for the words *from time whereof*, &c. were not repeated in the allegation of its existence *since the said division*, &c.; but it was only alleged that *since the division* the lord had (in fact) seized, and been accustomed to seize, &c.

But the Court (stopping *Burrough* and *Dampier* in support of the rule) said, that the whole was stated as one immemorial custom; which was disproved by shewing the division to have taken place within time of memory: and therefore made the rule absolute.

Pitt v. Green.

9 East, 188. Jan. 25, 1808.

A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellar-beer* field, instead of the *Aller-beer* field; being considered as part of the description of the deed declared on; though the plaintiff waived going for damages on the breach of that covenant, is fatal.

IN covenant, the declaration set forth, that by indenture the defendant demised to the plaintiff a messuage at *Star Cross*, with the garden and four several fields belonging to the dwelling house, to hold for 21 years, at the rent of 150*l.*; and that the defendant thereby covenanted with the plaintiff, that he would repair all the premises; and under-ground-gutter the *Cellar-Beer* field; and set up a proper hedge to fence out the plot of ground on *Warborough*; and the declaration assigned breaches on all those covenants. The defendant pleaded *non est factum*, and six other pleas negating the breaches of covenant: upon which issues were joined. At the trial before *Thomson, B.* at *Exeter*, on proving the lease, an objection was taken by the defendant's counsel, that there was a fatal variance between that and the lease declared on: the covenant in the lease produced being to under-ground-gutter the *Aller-Beer* field, instead of the *Cellar-Beer* field as stated in the declaration: and the point being reserved, the cause went on; and a verdict was found for the plaintiff on some of the issues on other breaches of covenant than that relat-

ing to the *Aller-Beer* field: with leave, to the defendant to move to enter a nonsuit, if the Court thought the objection well founded.

Pell now shewed cause against a rule obtained in last *Michaelmas* term for entering a nonsuit. He said, it was a mere clerical mistake: which in *Rollston v. Smith*, 4 Term Rep. 161, was held not to vitiate a certificate of registry. And if, as was said, in *Dundas v. Lord Weymouth*, Cowp. 665, it be only necessary to set out the substance of the covenant on which a breach is assigned, a variance in an immaterial part set forth, (and here the plaintiff waived proceeding on the breach of that part of the covenant) cannot be fatal. [*Le Blanc, J.* The danger there stated was in setting out unnecessary parts of the indenture, because the plaintiff was liable to fail in his action if there were a variance in setting out even an immaterial part.] He then referred to *King v. Pippet*, 1 Term Rep. 235, and *Cunning v. Sibley* there cited, lb. 239, and *Warre v. Harbin*, 2 H. Blac. 113, where variances in setting out precepts were held immaterial: and to *Williams v. Ogle*, 2 Stra. 889, where the wrong spelling of a name, *Segrave* for *Seagrave*, in setting out a record, was said to be *idem sonans*, and no material variance. And such, he contended, was *Cellar-Beer*, for *Aller-Beer*. And that this was not like the variance in *Wilson v. Gilbert*, 2 Bos. & Pull. 231, between the parish *St. Ethelburg* and *St. Ethelburga*; which the Court of C. B. thought might designate two different saints of different sexes.

Lens, Serjt. and Dampier, contra, were stopped by the Court.

LORD ELLENBOROUGH, C. J. The counsel cannot argue with a greater desire to get rid of the objection than the Court had in the first instance; and therefore, we wished to compare the record with the deed, in order to see whether the word as written in the one would admit of being read as it appears in the other; but in the one it is so distinctly written *Cellar-Beer*, that we cannot read it *Aller-Beer*, as it distinctly appears written in the other; neither can we say they are the same word in sound. And being a sensible word as it stands in the record, we cannot reject it as surplusage. Then taking it as part description of the deed declared on, the variance is fatal(1).

Per Curiam,

Rule absolute.

Cardwell v. Martin.

9 East, 190. Jan. 26, 1808.

A. and B. having exchanged their acceptances of bills drawn by each on the other at so many days; held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptances is) for 20 days, be post-dated without a new stamp, as upon new bills; although during all that time each had remained in the hands of the original drawer.

THE plaintiff declared as indorsee of a bill of exchange against the acceptor; and it appeared that the bill in question, which was drawn by *Giles and Co.* on the 3d of *June* 1807, payable to their own order, and accepted by the defendant at three months' date, was exchanged by him with *Giles and Co.* for their acceptance of a bill drawn by the defendant for the same sum at 85 days, payable to his order; the object being that *Giles and Co.* should put the defendant in cash before his acceptance became due. On the 23d of *June*, before *Giles and Co.* or the defendant had passed the respective securities to any other person, it was agreed to procrastinate the payment of the bills by post-dating them the 23d of *June* instead of the 3d. And the question at the trial was, whether such an alteration could be made under these circumstances

(1) Vide *Bowditch v. Mawley*, 1 Campb. 195.

without a new stamp? Lord *Ellenborough* was of opinion, at the trial at the last sittings at *Guildhall*, that it could not; and nonsuited the plaintiff: but it was agreed that the jury should assess the damages; and if the Court thought that a new stamp was not necessary, the plaintiff had leave to move to enter a verdict for so much. Which

The *Attorney-General* now moved for accordingly; contending that it was competent to the original parties, by whom the securities were framed, to make any alteration in them before they were negotiated; each of the bills having remained, till after the alteration on the 23d of *June*, in the hands of its respective drawer. If this be not so, it seems difficult to support the determination of this Court in *Low v. Waller*, Dougl. 736.; where a bill of exchange in the hands of an innocent indorsee was avoided on account of an usurious consideration as between the indorsers and the acceptor, in whose hands it was placed by the drawer and payee for the purpose of raising money; though there were no usurious consideration stated as between the original drawer and payee and the acceptor. The Court therefore must have considered that while the bill remained in the hands of the first taker, and before it was negotiated, it was liable to the taint of usury attached by the stat. 12 Ann. st. 2. c. 16, upon any *contract made* upon an usurious consideration. Though the general rule is, that if the bill be valid in its inception, an indorsee for a valuable consideration, without notice, is not affected by any usurious consideration for passing the bill through the hands of intermediate holders(a).

The Court, however, were all of opinion in this case, that the objection was well founded. The delivery of the bill by the drawer to the acceptor, and the re-delivery of it to the drawer for a valuable consideration, such as the exchange of acceptances has been held to be since *Cowley v. Dunlop*, 7 Term Rep. 565, was a negotiation of the bill. The several drawers were mutual purchasers of each other's acceptances. And while the bill in question was in this course of negotiation, and after it had continued so 20 days, during which time it was in the power of the drawer and payee to have passed it to any third person, the alteration was made. This was in effect drawing a new bill(1).

Rule refused.

Buchanan v. Rucker.

9 East, 192. Jan. 25, 1808.

The law will not raise an *assumpsit* upon a judgment obtained by default in one of the colonies against a party, who, upon the face of the proceedings, appeared only to have been summoned "by nailing up a copy of the declaration at the Courthouse door:" it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the Colonial Court at the time of the suit commenced, or afterwards; although by a law of the colony, if a defendant be *absent from the island*, and have no attorney, manager, or overseer there, such mode of summoning him shall be deemed good service: for the *absence* thereby intended is of one who had been *present* and subject to the jurisdiction; though even if it had been meant to reach strangers to the jurisdiction it would not have bound them.

THE plaintiff declared in *assumpsit* for 2000*l.* on a foreign judgment of the island Court in *Tobago*, and at the trial(b) before Lord *Ellenborough*, C. J. at *Guildhall*, produced a copy of the proceedings and judgment, certified under the hand-writing of the Chief Justice, and the seal of the island, which were proved; which, after containing an entry of the declaration, set out a

(a) Vide *Parr v. Eliason*, 1 East, 92.

(1) Vide *Knill v. Williams*, 10 East 481.

(b) Vide 1 Campbell's Nisi Prius Cases, 68.

summons to the defendant, therein described as "*formerly of the city of Dun-kirk, and now of the city of London, merchant,*" to appear at the ensuing Court "to answer the plaintiff's action; which summons was returned served, &c. *by nailing up a copy of the declaration at the Court-house door,*" &c. on which judgment was afterwards given *by default*. Whereupon it was objected, that the judgment was obtained against the defendant, who never appeared to have been within the limits of the island, nor to have had any attorney there; nor to have been in any other way subject to the jurisdiction of the Court at the time: and was therefore a nullity. And of this opinion was Lord *Ellenborough*; though it was alleged, (of which however there was no other than parol proof), that this mode of summoning absentees was warranted by a law of the island, and was commonly practised there: and the plaintiff was thereupon nonsuited. And now

Taddy moved to set aside the nonsuit, and for a new trial, on an affidavit verifying the island law upon this subject; which stated "That every defendant against whom any action shall be entered, shall be served with a summons and an office copy of the declaration, with a copy of the account annexed, if any, at the same time, by the Provost Marshal, &c. six days before the sitting of the next Court, &c.; and the Provost Marshal is required to serve the same on each defendant in person. But if such defendant cannot be found and is not *absent from the island*; then it shall be deemed good service by leaving the summons, &c. at his most usual place of abode. And if the defendant be *absent from the island*, and hath a power of attorney recorded in the secretary's or registrar's office of *Tobago* and the attorney be resident in the island, or any manager or overseer on his plantation in the island, the service shall be either upon such attorney personally, or by leaving it at his last place of abode, or upon such overseer or manager personally, or by leaving it *at the house upon the defendant's plantation where the overseer or manager usually resides*. But if no such attorney, overseer, or manager; then the *nailing up a copy of the declaration and summons at the entrance of the Court-House* shall be held good service.

LORD ELLENBOROUGH, C. J. There is no foundation for this motion even upon the terms of the law disclosed in the affidavit. By persons *absent from the island* must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the Court; but it can never be applied to a person, who, for aught appears, never was present within or subject to the jurisdiction. Supposing, however, that the act had said in terms, that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the court door; how could that be obligatory upon the subjects of other countries? Can the island of *Tobago* pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself, however, fairly construed, does not warrant such an inference; for "*absent from the island*" must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the Court out of which the process issued: and as nothing of that sort was in proof here to shew that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an *assumpsit* in law upon the judgment so obtained (1)(2).

Per Curiam,

Rule refused.

(1) Vide *Walker & al. v. Witter*, Doug. 1. *Crawford v. Whittal*, Doug. 4. n.(1). *Galbraith v. Neville*, Doug. 6. n. (1) & 2). S. C. 5 East 476. n.(b). *Sinclair v. Fraser*, in Dom. Proc. March 1771, cited in the *Duchess of Kingston's* case, 11 St. Tr. 122, by Hargr. *Kibbe v. Kibbe*, Kirb. 119. *Phelps & al. v. Holker & al.*, 1 Dall. 261. *Wright v. Tower*, decided by the Hon. Judge Rush, when President of the Court of Common Pleas for the third district in *Pennsylvania*, and reported in an Appendix to the *Philadelphia* edition of Doug. Rep. *Bartlett v. Knight*, 1 Mass. Rep. 491. *Hutchcock & al. v. Aicken*, 1

Raine v. Bell.

9 East, 195. Jan. 26, 1808.

It is not an implied condition in a common marine policy on ship and freight that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay or otherwise increasing the risk of the insurers: and therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course by reason of a scarcity at her lading ports, and during her justifiable stay in the port so entered for that purpose she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage: it was held not to avoid the policy.

THIS was an action on a policy of insurance "on the ship *Rio Nova*, and freight, from her loading port or ports on the coast of *Spain* to *London*, with liberty to touch and stay at any port or place whatever, without being deemed a deviation." The plaintiff declared on a loss by the perils of the sea. It appeared in evidence at the trial at *Guildhall*, that by the long continuance of the voyage from port to port in *Spain*, and the difficulty of obtaining provisions on the coast at that time, the ship's provisions had run very short, and she was obliged to put into *Gibraltar* to lay in a sufficient stock before her departure for *London*. But it also appeared, that while the ship lay at *Gibraltar* for that purpose the Captain received on board some chests of dollars on freight: and some question was at first attempted to be made whether the true object of going there was not to take on board these dollars; but the weight of the evidence was against this supposition: and finally, Lord *Ellenborough*, C. J. left it to the jury to say, whether the going into *Gibraltar* were of necessity in order to obtain a proper stock of provisions; and if so, whether the stay there were longer than was necessary for that purpose: telling them that in either case the policy would be avoided. The jury, however, affirmed the necessity of the ship's touching and stay at *Gibraltar* in order to lay in her provisions: and the loss of the ship being proved to have happened by the perils of the sea off the coast of *Cornwall* in her homeward-bound voyage, they found a verdict for the plaintiff for the amount of the defendant's insurance. But a question of law was raised, whether the taking in the additional cargo of dollars at *Gibraltar*, which was said to be a *breaking bulk* in the course of the voyage at a place where there was no liberty to trade, did not avoid the policy; as increasing, or having a tendency to increase the risk of the underwriters beyond the terms of the policy: and this, it was contended by the defendant to do, on the authority of Lord *Kenyon* in *Stitt v. Wardell*(a), and of Lord *Ellenborough* in *Sheriff v. Potts*(b). And in order to discuss this point a rule *nisi* was obtained in the last term for setting aside the verdict, and for a new trial; against which

The Attorney-General, Park, and Dampier, shewed cause, and denied the application of the cases cited to the present, as well as the reasoning on which they were said to be founded. The question of deviation by going into *Gibraltar* is wholly removed by the finding of the jury, justifying the necessity

Caines 460. *Kilburne v. Woodworth*, 5 Johns. 37. *Taylor v. Bryden*, 8 Johns. 173. *Stoddard v. Allen*, Chip. 44. See also *Hall v. Odber*, 11 East 118.

(1) [The merits of a judgment given in a sister state cannot be put in issue, in an action on such judgment, provided the Court, rendering it, had competent jurisdiction, and it appear by the record that the defendant had notice; and it makes no difference whether the judgment was obtained by default or on trial. *Evans v. Tatem*, 9 S. & R. 260. *Benton v. Burgot*, 10 do. 240. *Com'ith v. Green*, 17 Mass. 515. 546. *Woodward v. Tremere*, 6 Pick. 354. *Hall v. Williams*, do. 232.—W.]

(a) Tried at the sittings after *Michaelmas* term 38 Geo. 3 at *Guildhall*, 2 Esp. Ni. Pri. Cas. 609. and *Park* on *insur.*

(b) Sittings after *Michaelmas* term 44 Geo. 3. 5 Esp. Ni. Pri. Cas. 96.

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of it. The only principle on which the *breaking of bulk*, properly so called, in the course of the voyage insured, that is, the unshipping of any part of the original cargo for the purpose of trading, can be deemed to avoid the policy, is on account of the delay thereby occasioned, which increases the risk of the underwriters, unless a liberty to stay and trade at the particular place be stipulated for. But that cannot apply to a case where the whole stay of the ship was covered by a justifiable necessity: and where not even the disposition of any part of the original cargo could be altered by taking in a few chests into the cabin. In the case of *Stitt v. Wardell* there was an actual breaking of bulk in the course of the voyage: for the ship having been driven by stress of weather into *Dublin* harbour, she continued there no less than three weeks, and during that time unloaded part of her cargo of coals and sold them. It does not appear by the report of the case, that the necessity which first brought the vessel into *Dublin* continued during the whole three weeks; nor is it probable that it should, as it does not appear that she was under repair during the time: and Lord *Kenyon's* opinion turned upon the liberty to *touch* at any port not extending to a liberty of *trading* there. Besides, that was a case of the first impression; and can only be supported on the principle of the act done operating to increase the underwriter's risk; for there is nothing in the terms of the policy itself which prohibits even the unloading a part of the cargo, or the taking in other goods: such acts are only prohibited by implication, as they may occasion delay in the prosecution of the voyage insured: and if no delay be in fact occasioned, it seems difficult to say how the mere act of unloading part of a ship's cargo can increase the risk of the underwriters on the ship. [In answer to a question from the Court, they disclaimed any right to cover the freight of the dollars so taken in at *Gibraltar*: only contending that the taking them in did not avoid the policy on the ship or the freight of the original cargo insured.] The case of *Sheriff v. Potts* was ruled on the authority of the former case; with this additional circumstance, which was relied on by Lord *Ellenborough*, that there was a special liberty reserved "to touch and discharge goods at *Lisbon*" in the course of the voyage from *Guernsey* to *Gibraltar*; which was considered to be a virtual exclusion of the liberty of taking in a new cargo at *Lisbon*. They also reasoned by analogy from the case of hypothecation. Where a ship is driven into a foreign port by distress, and is obliged to repair, not only is it warrantable to unship the whole cargo for the purpose of the repair; but as the captain may hypothecate the cargo (a) as well as the ship for the expence of the repair, so he may unload and sell a part of the cargo for that express purpose.

Garrow and *Marryat*, contra. It is no answer to the objection that the policy does not expressly prohibit any alteration of the cargo in the course of the voyage by unloading part or taking in other goods, or as it is commonly and technically called the *breaking bulk*; which includes goods stowed in the cabin as well as under the hatches. There are many implied stipulations in favour of the underwriters, such as that a ship shall be properly documented; that she shall be sea-worthy; and have a sufficient complement of men and stock of provisions, &c. One of these is, that she shall not *trade* in the course of the voyage: and there is no distinction in this respect between a greater and less degree of trading; between unloading or taking in a single bale or package, or a hundred: any partial alteration of the cargo in the course of the voyage may affect the whole: it may or it may not in a particular instance occasion delay in the prosecution of the voyage: that will depend upon a variety of minute circumstances and considerations, which it is usually impossible for an underwriter to trace; but any degree of trading has a necessary tendency to create delay; it holds out a continual temptation to

(a) Case of the *Gratitude*, 3 Rob. Adm. Rep. 240.

deviate from and delay the voyage: and it is on account of this necessary tendency, and the difficulty of discriminating how much delay is to be attributed to necessity and how much to the trading, that the policy of the law raises an implied engagement in the assured, that the ship shall not trade at all in the course of the voyage, unless permission to do so be expressly reserved: and the very reservation of such express permission in certain cases shews the understanding of the mercantile world that it is prohibited in all others. The cases of *Stitt v. Wardell*, and *Sheriff v. Potts*, have judicially established the implied prohibition against breaking bulk or trading in the course of the voyage: and it is better for all parties to abide by the plain broad rule of an entire prohibition, than to introduce a dubious question into every case, how far the trading tended to delay. [Lawrence, J. observed, that the facts reported in *Stitt v. Wardell* did not support the reason said to be given by Lord Kenyon for avoiding the policy, namely, that the holding the underwriters liable would be to make them insure a voyage not in their contemplation; for there was no deviation in that case from the course of the voyage; but the ship was forced by stress of weather into *Dublin*.] If the liberty of trading be allowed at all, it will not be difficult to frame pretences of necessity from weather and accident to run into ports, or to protract a ship's stay there when really forced in for shelter.

LORD ELLENBOROUGH. C. J. If the taking in the dollars at *Gibraltar* materially varied the risk of the underwriters, they would be discharged by it; but that it did not vary the risk by occasioning any delay of the voyage was expressly found by the jury to whom the question was left, and who were of opinion that the whole period of the ship's stay there was covered by the necessity which originally induced the captain to go into *Gibraltar*. I have turned it in my mind whether the risk might not have been increased by the particular kind of cargo, namely, treasure, taken in there: if that were known at the time to an enemy, it might hold out an additional temptation to him to seek for and attack the ship. But I do not know that a mere temptation of this sort has ever been held a sufficient ground to avoid a policy, if the original act itself were lawful. This, it must be remembered, is the case of a policy on ship and freight; I reserve giving any opinion as to the operation of a change in the state of the cargo in the case of a policy on goods; because the taking in of other goods in the course of one entire voyage, where it is not provided for, may be contended to constitute a different adventure from that on which the ship started with her cargo. But here no part of the original cargo was taken out, as in *Stitt v. Wardell*; nor any narrower liberty reserved, as in *Sheriff v. Potts*, which might operate as a virtual exclusion of taking in other goods. But this case stands on its own ground; where something has been superadded to the original cargo while the ship was delayed from necessity in a port into which she was obliged to go; and the jury having negatived that any delay was occasioned by the taking in of the additional goods.

His lordship, after the other judges had delivered their opinions, added, that nothing said by the Court would justify the taking in any cargo in the course of the voyage which would in any manner enhance the risk of the underwriters.

GROSE, J. The good sense of the thing, in ascertaining whether or not the act done avoided the policy, is to know whether it did or did not increase the risk of the underwriters. Now here the jury having negatived any deviation from or delay in the voyage on account of taking in the dollars at *Gibraltar*, there seems no reason for saying that the risk of the underwriters was thereby increased; and therefore I will not disturb the verdict.

LAWRENCE, J. I agree that the verdict is right. There is nothing in the terms of the policy to restrain the captain from taking in dollars; no additional risk was incurred to the ship by the nature of the cargo, from the

laws of the country where it was taken in : which might have altered the case : but the jury have found that the ship went into *Gibraltar* on a necessary occasion, and did not stay there longer than that necessity justified. If *Gibraltar* had continued a port of *Spain*, there is no doubt but that the dollars might have been taken on board without vitiating the policy : but the objection is, that because *Gibraltar* is not a port of *Spain* the taking them in there avoids the policy, although it be found by the jury that no delay in the voyage was thereby occasioned. This is not like a deviation ; for that alters the risk insured ; but here the risk was not in fact altered. Then it is said that it holds out a *temptation* to deviate. But if an *intention* to deviate, not carried into effect, will not avoid a policy ; still less can a temptation to deviate ; as in *Moss v. Byrom*, 6 Term Rep. 379. If the doing of a thing do not alter the risk of the underwriter, and be not expressly prohibited to be done ; I cannot say that it vitiates the policy as upon the breach of an implied condition. The case of *Stitt v. Wardell* passed at *nisi prius*, and was not afterwards brought in review, before the Court ; and though it was the opinion of a most eminent judge ; yet the greatest are liable to error in delivering their opinions on the sudden. And if the same question should occur again, I think it will deserve further consideration : for unless it can be shewn that the underwriters' risk is varied by taking out part of a cargo in the course of the voyage, as at present advised, I do not understand how it can avoid the policy.

LE BLANC, J. I am of the same opinion. Two cases have been relied on to shew that the mere fact of taking out and selling part of the cargo, or the taking in other goods in the course of the voyage, will avoid the policy : but those were decisions at *nisi prius*, which were never brought before the Court, and might have turned on the particular circumstances of those cases. But now the question is fairly raised and brought before the Court, we must decide it according to the principle by which marine policies of insurance are governed in respect of implied conditions. It is said, that because liberty is sometimes expressly reserved for a ship to touch, stay, and trade in the course of the voyage, it is impliedly excluded in every policy in which it is not so reserved : but the reason of the express reservation is in order to justify the delay in trading ; the staying at a place for the very purpose of trading there : but if a ship touch at a port which is allowed, and stay there for any reason which is allowable within the intent and meaning of the policy, and no additional risk to the underwriters be incurred by her trading there during such her stay for an allowed or justifiable cause, I can see no reason why such a trading should in itself avoid the policy. It is said however, that the giving liberty to trade at all will be a temptation to the master to deviate from and to delay the voyage with that view, and that it will be difficult for the underwriters to detect it : but that must necessarily be a question for the jury to decide, as in other cases of fraud, whether the deviation or delay arose from necessity or from the trading ; and wherever the case was doubtful upon the evidence, it would generally turn the verdict against the assured who would have to account for the delay or deviation. But where it is found that no delay was occasioned by the trading, I see no reason why we should imply a condition which the parties themselves have not made, in order to avoid the policy as for a breach of it. Neither do I think it would be generally convenient to increase the number of small circumstances unconnected with the occasion of the loss which will relieve the underwriters from their engagement to indemnify the assured, by the introduction of new implied conditions which the parties do not express in the policy(1)(2).

Rule discharged.

(1) Vide *Cormack v. Gladstone*, 11 East, 347. *Laroche & al. v. Oswin*, 12 East, 131.
 (2) [In 1 Phill. Ins. p. 533, the author thus sums up the law upon this head. "A question has been made whether liberty to touch at a port involves that of staying or trading

The King v. The Inhabitants of the Township of St. Bees Quarter, in the parish of St. Bees.

9 East, 208. Jan. 25, 1808.

Payment by one, who was assessed to a church rate upon *householders* only, and not upon the parishioners at large, will nevertheless gain him a settlement; for it is not less a *public tax* because laid too narrowly; and it is *charged and paid* within the parish, which is all that is required by the stat. 3. W. 3. c. 11. s. 6.

TWO Justices by an order removed *Sarah Tidyman*, widow, and her four children, by name, from the parish of *Egremont* to the township of *St. Bees*, both in the county of *Cumberland*; which order was confirmed by the Sessions on appeal, subject to the opinion of the Court on the following case:

The pauper *Sarah*, 26 years ago, married *John Tidyman*, who was settled at *St. Bees*, and went from thence to reside with him in *Egremont*; and they occupied a house there till his death, two years ago. A year after they occupied the house, *J. Ponsonby*, a churchwarden of *Egremont*, called at the house for an assessment, (generally called in the parish a *couple sess*, but which the pauper *Sarah* understood to be a *church sess*.) and told her that her husband was assessed; and she paid 1s. 2d. as the sum assessed. Fifteen years ago, *D. Saunderson*, another churchwarden of the parish, also called at the house for an assessment, and told the pauper that her husband was assessed, and she paid him 1s. A similar demand for an assessment was also made in 1791, by two churchwardens; and the pauper again paid 1s., which latter assessment was in this form:

“ 1791.

“ An assessment upon the householders in the parish of *Egremont*, at 1s. per couple, for the ornaments and repairs of the parish church.” s.

X *John Tidyman* - - - - - 0 1 0

“ We whose names are hereunto subscribed (being of the church vestry) do allow of this as a regular assessment; as witness our hands, the 26th of *March* 1791.”

(Signed by the minister and eight other persons, including the two churchwardens.)

The names of 132 other householders of the parish, besides *John Tidyman*, were included in the assessment, and the X opposite his name denoted that his assessment had been paid. It appeared from the churchwardens' accounts of that year, entered in the vestry-book, that the sums received under that assessment were in part laid out on the repairs and ornaments of the church, and the rest in payment of a debt due to the preceding overseers. But that assessment not being sufficient another was made in the same year, in aid of it, upon the landholders of the parish, who were never assessed but when the assessment upon the householders proved insufficient. And it was frequently the practice for the select vestry of the parish to make out these assessments in the form of a list of the names of the inhabitants liable to pay: charging the married householders at 1s. each; and widowers and widows, householders, at 6d. each; which assessments were afterwards submitted to and approved by the general parish vestry. The Sessions adjudged that the pauper's husband had not gained a settlement in *Egremont* by the above ratings and payments.

This seems to be answered by the principles and cases already stated: by which it appears, that the master must keep in view the purpose for which the policy gives the liberty, and also the expedition and furtherance of the adventure; but whatever he does besides, whether he trades or unloads and re-loads his cargo; if the risks insured against are not thereby affected, the underwriters have no ground of exception.”—W.]

Topping in support of the order of Sessions, contended that the rate was clearly bad on the face of it. It was made upon the *householders* only, and not upon the *parishioners* at large: and therefore no settlement could be gained by being assessed to and paying it. He admitted, that a mere irregularity in the manner of rating would not preclude one from gaining a settlement who paid under it; as in *St. Giles, Cripplegate*, and *St. Mary, Newington*, 19 Vin. Abr. 386, and 1 Sess. Cas. 22.: but he urged that this was no rate at all, but a mere nullity; in which case, according to *Rez v. Edgbaston*, 6 Term Rep. 540, no settlement could be gained by payment of it.

LORD ELLENBOROUGH, C. J. The settlement is given by the stat. 3. W. 3, c. 11. s. 6, to any person inhabiting any town or parish, who shall be charged and pay his share towards the public taxes or levies of the town or parish. Now if a public tax be laid too narrowly, is it less a public tax on that account? This was a *Tax*, and it was *public*, and it was *charged* and *paid* within the parish. What else is required to meet the act of parliament? Suppose a particular chapelry within the parish had been omitted in the rate, it would not have been less a public tax on the rest of the parish.

LE BLANC, J. The objection, pushed a little further, would go to invalidate every settlement under a rate wherein one person was improperly omitted.

Per Curiam,

Order of Sessions quashed.

Park and *Littledale* were to have argued against the order.

The King v. The Inhabitants of Norton, Juxta Kempsey.

9 East, 206. Jan. 27, 1808.

A deserter from the king's marine service cannot gain a settlement under a hiring and service for a year: not being *sui juris*, nor competent lawfully to hire himself within the stat. 3 W. & M. c. 11. s. 7.

TWO justices by an order removed *Sophia* the wife of *Edward Lea*, a marine, and their infant child *William*, from the hamlet of *Oversley* to the parish of *Norton*, both in the county of *Worcester*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

Edward Lea, being legally settled at *Norton*, was duly enlisted as a private into his majesty's marine forces, from which he deserted, and then hired himself for a year to Mr. *Shayle* of *Oversley*, and served a year under that hiring. After the determination of this service, he was taken up for desertion, tried by a court martial, and convicted of the same. The question for the opinion of the Court was, whether he gained a settlement in *Oversley* (which maintains its own poor) by virtue of such hiring and service.

Reader and *B. Morice*, in support of the order of Sessions, contended that a soldier who had deserted from the king's service was not *sui juris*, and could not within the words and meaning of the stat. 3 W. & M. c. 11. s. 7, be lawfully hired. He could not contract the relation of servant to any other master, the duties of which were inconsistent with those which he owed to the king. Upon the same principle it was determined in several cases (a) that an apprentice, not being *sui juris*, cannot contract himself as a servant to a third person, nor gain a settlement under a hiring and service. The case of the soldier is even stronger than that of an apprentice; for the former is guilty of a crime by deserting the king's service; whereas the latter is only liable *civilliter*: and the policy of the law is much stronger against the power to contract a second engagement for service in the one case than in the other.

(a) *Buckington v. Shepton Dechamp*, 2 Const. Bott. 570. 2 Ld. Ray. 1252, and 1 Stra. 552. *Rez v. Audrey*, Barr. S. C. 441. *Rez v. Ecclesal Bierlow*, ib. 562. *Rez v. Haberdon*, 1 Term Rep. 189, and 2 Const. Bott. 576. *Rez Sandford*, 1 Term Rep. 231. *Rez v. Hindringham*, 6 Term Rep. 557.

Reynolds and Birch, contra, endeavoured to distinguish this from the case of an apprentice, which, they said, turned altogether upon the restrictive force of the indenture, and could not therefore apply to any case of a previous engagement by parol to serve another. In the case of a general hiring, if the servant depart before the stipulated time of service, the only remedy by the master is by an action on the contract: but it never was disputed but that if the servant immediately after made a new contract of hiring for a year, and served under it, he would gain a settlement: and the first master could not maintain an action against the second for the wages or work and labour of the servant. But it is otherwise in the case of an apprentice, for the recompence for whose work and labour as a servant the original master, and not the apprentice himself, may maintain an action against the second master after notice. It is true, that the king might have interfered, and defeated the service to the master by taking the pauper away; but the contract would still have been binding on both the parties to it; and as on the one hand, if the service were thus interrupted, the master would have had a remedy for the breach of contract against the servant; so on the other hand, where the service was in fact performed, the servant has his remedy upon the contract for the stipulated wages. The word *lawful*, in the statute of King *William*, means a contract of hiring and service lawful in the terms of it, and not within the exceptions of any of the statutes relating to servants. It has been held in *Rez v. Westerleigh*, Burr. S. C. 753, and *Rez v. Winchcomb*, Dougl. 391, that a *militiaman* might gain a settlement by hiring and service, though he were absent a part of the time on duty; the term of his absence having been stipulated for by him: and yet the same objection would have applied to him, that he was not *sui juris*: for he might have been called out on duty the whole time.

Lord ELLENBOROUGH, C. J. That was the case of a lawful contract with a just exception. The public had a claim upon the militiaman's service for a certain time; and subject to that claim he might lawfully contract to serve his master. If this case were perfectly *res integra*, there might have been great doubt whether the word *lawfully* in the statute of King *William* were not to be narrowed in its construction to a contract in the terms of it *lawful*: and if the contract were lawful in its form, it might have afforded an argument, whether the party serving under it could be disabled from gaining a settlement under it, by reason of his having before contracted an engagement with another person inconsistent with it. But a variety of cases have occurred which have decided the question in the case of an apprentice: and this, not on the ground of its being an excepted case, or as standing upon any occult efficacy in the indenture of apprenticeship; but upon the broad principle that one, who has contracted a relation which disables him from serving any other without the consent of his first master, is not *sui juris*, and cannot lawfully bind himself to serve such second master, so as to gain a settlement by serving for a year under such second contract. In reason and principle it cannot make any difference whether he be originally bound by a contract of apprenticeship, or by any other contract equally obligatory upon him, which disables him from binding himself to serve a second master. The objection is, that he cannot give the master a controul over his service for the whole period which the master stipulates for, and has a right to require by the contract. The king's officers might at any time have reclaimed him, and taken him out of the service in which he was engaged: he cannot therefore be said to have been *lawfully* hired into it. The remedy which the master might in that case have had against him is another question: and the very want of power to bind himself, as he assumed, without authority, to do, might have founded a cause of action against him by the master. But a soldier is at least as much bound to the service of the king, as an apprentice is to that of his master; and

nothing is to be inferred from the measured language of the Court in the case of an apprentice, in not laying down the principle broader than the matter in judgment required: but nothing was said by the Court in any of the cases intimating an opinion that the rule there laid down was confined to the single case of an apprentice; and therefore we must look to the reason and principle of these decisions when we are called upon to apply the rule to similar cases.

GROSE, J. The words of the statute have been considered, and a construction put upon them in the instance of an apprentice; and I cannot distinguish this case in principle from that.

LAWRENCE, J. The decisions referred to have concluded the present question, if they were not made upon any ground peculiar to the case of an apprentice: but, as I understand them, they proceeded upon the ground that an apprentice was not *sui juris*, and could not therefore subject himself to the control of a second master for a whole year under a contract of hiring. And that principle will equally govern the present case.

LE BLANC, J. The prior cases have decided this. The principle of them is that if the party cannot make such a contract for his service, of which the master may avail himself for the whole year according to the contract, no settlement can be gained under it.

Orders confirmed.

The King v. The Inhabitants of Stow-Market.

9 East, 211. Jan. 29, 1808.

A poor boy sent out of the house of industry at 14 years of age to the parish officers, and by them allotted to a parishioner, who handed him over to another person, by whom the boy was told that he was to stay with him a year, and should have clothes, &c.; to which the boy made no objection; conceiving himself obliged to accept the service; but made no agreement for wages, or concerning the nature or duration of his service, nor was consulted upon the subject; does not gain a settlement by serving under this supposed obligation for a year; for neither did he consider himself, nor was he considered by the other parties, as a free agent; and such only can contract, or adopt a contract made by others.

JOHN EDWARD KING, a pauper and his wife were removed by an order of justices from *South Lopham* in *Norfolk* in *Stowmarket* in *Suffolk*. The Sessions on appeal, confirmed the order, subject to the opinion of this Court on the following case:

J. E. King the pauper being settled by birth in *Stowmarket*, was in the year 1801 a poor boy, at the age of fourteen, in the house of industry for the poor of the incorporated hundred of *Stow*. In this hundred the directors and acting guardians of the said house are empowered by the act incorporating the hundred to apprentice poor children for seven years. It does not appear that they ever exercised this power: but instead of binding the children apprentices when of sufficient age, they were sent out of the house to their respective parishes: and the parish officers allotted them during three years to particular parishioners, either to retain them in their own, or to provide them with other services. Some time before *Michaelmas* 1801, the pauper J. E. King was sent by the directors and acting guardians of the house to Mr. Reynolds of *Stowmarket*, to whom he had been previously allotted by the officers of that parish. Mr. Reynolds, not having employment for the pauper, told him that he (Mr. Reynolds) had procured a service for him with Mr. J. Fox of *Coddenham*. The pauper made no objection to go, conceiving that he had no discretion on the subject. On the day after *Michaelmas*, the pauper went to Mr. Fox, who received him, and told him that he would give him clothes, and that he was to stay with him

a year. Nothing further passed between the pauper and Mr. *Reynolds* or Mr. *Fox*, respecting wages, or the nature or duration of the service. The pauper continued in Mr. *Fox's* service as a farming servant till the following *Michaelmas*; receiving his clothes and maintenance, and now and then a little pocket money. On the 25th of *September* 1802, the pauper was sent for by Mr. *Stutter of Stowmarket*, to whom he had been allotted (in the same manner as he had been in the former year to Mr. *Reynolds*) for the following year. On the ensuing *Michealmas* day, the pauper went to Mr. *Stutter*, who gave him a holiday on that and the following day; and having no occasion for his service, Mr. *Stutter* told the pauper that he had procured him a service with a relation, Mr. *Frost of Brent Eleigh*. The pauper went to Mr. *Frost*, without making any application to the directors and acting guardians, or to the parish officers, and continued with Mr. *Frost* till *Michaelmas* 1803, in the same situation as he had done before with Mr. *Fox*. The pauper himself made no agreement with Mr. *Fox*, or with Mr. *Frost*, respecting wages, or the nature and duration of his service with them; nor was he consulted on the subject either by Mr. *Reynolds*, or by Mr. *Stutter*, to whom he had been previously allotted: but conceived himself obliged to accept these services, as being under the controul and jurisdiction of the house of industry and of the parish officers of *Stowmarket*, where the directors and acting guardians had first sent him.

Wilson and Hulton, in support of the orders, insisted that there was no contract of hiring at all, and of course the pauper could gain no settlement by his service with either of the masters to whom he was, in the language of the case, *allotted*. And the Court called on the counsel for the appellant parish to proceed.

Nolan and Frere, contra, contended that though the boy himself had made no contract with either of the masters whom he served, yet that by his service he must be taken to have acceded to the terms made on his behalf by the guardians of the poor, or those who stood in their place, and therefore to have adopted the contract of hiring made by them on his behalf. In the case of *The King v. Rickingham Inferior*, 7 East, 373, the relation of master and servant did not subsist at all, but the pauper was only placed out by the parish officers to lodge and board: but here he was expressly taken by the master to serve him as a servant: and the pauper assented to this by performing the service and receiving his clothing and maintenance. Then the pauper's misapprehension of the effect of his contract has often been determined not to be material.

LORD ELLENBOROUGH, C. J. All the parties seem to have acted under the idea that the boy was a parish slave, who might be handed over from one to another, and disposed of as they pleased. But there was no agreement by him to either of the services in which he was engaged: he submitted to them because he thought himself obliged to do whatever they bid him. If we were to hold this sufficient to give a settlement, we should establish a new head of settlement *by allotment*. The law gave these directors of the house of industry a certain power to apprentice out poor children; and instead of executing that power in a proper manner as the act directs, they assume to themselves a power to hand these children over to the officers of their respective parishes; who again hand them over to others; and so they are shifted from one to another. And now because the boy has done the work which he was made to do, and eat the meat and worn the clothes which were provided for him, it is argued that he has adopted so many contracts of hiring to which he was no party, and which were made without any consideration of his will and consent. But the adoption of a contract must be the act of a free agent: and at what period of time is he found by the case to have consented or contracted at all? On the contrary, it is stated that when told by *Reynolds* that he had procured a service for him with *Fox*, the pauper made no objection to go, *con-*

ceiving that he had no discretion on the subject. And again it is stated that the pauper made no agreement with Fox or Frost, respecting wages, or the nature and duration of his service with them; nor was he consulted on the subject by either of the persons to whom he had been allotted; but considered himself obliged to accept these services as being under the controul of others. Then can a person who is considered as a slave, and conceives himself to be such, be considered as having adopted the acts of his masters? It is against common sense so to construe his involuntary acquiescence. In the cases alluded to, where the pauper's misapprehension of the contract of hiring has been held not to vary the legal effect of it, the pauper meant to exercise a contracting power, though he mistook the legal effect of the contract which he had made.

The other Judges assented; and *Le Blanc, J.* added that he hoped the consequence of this decision would put an end to the improper practice which the directors of the house of industry had adopted in sending the children out of the house to the respective parish officers to place out, instead of providing for them in the manner pointed out by the act.

Orders confirmed.

Elizabeth Horn, Executrix of John Horn, v. Baker and Another, Assignees of Wm. Horn and Rd. Jackson, Bankrupts.

9 East, 215. Jan. 29, 1808.

A., B., and C., partners and distillers, occupied certain premises leased to *A.* and another, and used in common in the trade the stills, vats and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in *A.* On the dissolution of the partnership, which was a losing concern, it was agreed that *C.* and one *J.* should carry on the business on the premises; and by deed between the two last and *A.* it was covenanted and agreed, that *A.* should withdraw from the business, and permit *C.* and *J.* to use, occupy, and enjoy the distill-house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by *C.* and *J.* to *A.* and his wife and the survivor; with liberty for *C.* and *J.* on the decease of *A.* and his wife to purchase the distill-house and premises for the remainder of *A.*'s term, and the stills, vats, &c. mentioned in the schedule: and *C.* and *J.* covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased: and there was a proviso for re-entry if the annuity were two months in arrear. Under this, *C.* and *J.* took possession of the premises, with the stills, vats and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months: but *A.*'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of *C.* and *J.* who continued in possession of the stills, vats, and utensils on the premises.

On a question, Whether such stills, vats, and utensils, so continuing in possession of *C.* and *J.* the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom *A.* the owner was one, passed under the stat. 21 Jac. 1. c. 19. s. 10 and 11, to the assignees of *C.* and *J.* as being in the possession, order, and disposition of the bankrupts at the time of their bankruptcy as reputed owners? and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership, (of which reputed ownership, the jury are to judge from the circumstances;) held,

1. That the stills which were fixed to the freehold did not pass to the assignees under the words *goods and chattels* in the statute.
2. That the vats, &c. which were not so fixed, did pass to the assignees, as being left by the true owner in the possession, order and disposition (as it appeared to the eye of the world) of the bankrupts as reputed owners.
3. That the case would have admitted of a different consideration, if there had been a usage in the trade for the utensils of it to be let out to the traders; as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them.

THIS was an action to recover in damages the value of the interest which

the plaintiff claimed in certain stills, vats, and utensils, which the first count of the declaration stated that she was entitled to, subject to the use thereof by the defendants during her life; and that being so entitled, and the defendants well knowing the same, they wrongfully and injuriously broke and destroyed part, and sold and disposed of the rest. The second count was in trover for the same goods: to which the defendants pleaded not guilty; and upon the trial before Lord *Ellenborough*, C. J. at the *Middlesex* Sittings after the last term, a verdict was found for the plaintiff for 1000*l.* subject to the following case.

The plaintiff is the widow and executrix of her deceased husband *John Horn*, who before and at the time of making the indenture of the 20th of *March* 1801, after mentioned, was a distiller in *Southwark*. The defendants are the assignees of *Wm. Horn* and *R. Jackson*, who succeeded *John Horn* in the business of a distiller, and carried on the same until they became bankrupts, as after mentioned. At the time of making the said indenture, *John Horn* held the principal part of the messuages, buildings, and lands, whereon he had carried on the business of a distiller in partnership with *Robert Horn* and *William Horn*, and whereon there had been erected a rectifying distill-house, under a lease granted to him and *R. Jackson*, (since dead,) for a term which expired on the 30th of *Dec.* 1804: and he held other parts of the premises under another lease granted to him and the said *Richard Jackson*, since deceased, for a term which expired on the 24th of *June* 1805: and he and the said *Richard Jackson*, now deceased, had before held other parts of the premises under a lease for a term which expired on the 25th of *Dec.* 1799. The abovementioned partnership, which was a losing concern, expired before the making of the indenture hereinafter mentioned; and *William Horn*, at the time of making that indenture, and at the death of *John Horn*, was and now is indebted to the estate of *John Horn* in 500*l.* in respect of their partnership. By indenture dated the 20th of *March* 1801, between *John Horn* of the one part, and *Wm. Horn* and *Rd. Jackson* (the bankrupts) of the other; after reciting the said several leases, and at the time of making the last lease, the said *Rd. Jackson* (deceased) was in partnership with *John Horn*; and that *John Horn* had lately entered into partnership with *Wm.* and *Robert Horn* for a term then expired; and that since the expiration of the last-mentioned lease the premises therein comprised had been used and occupied by *John, Robert*, and *Wm. Horn* as yearly tenants; and that the partnership between *John, Robert*, and *Wm. Horn* had before the execution of that deed been dissolved by mutual consent; and that it had been agreed between *John Horn* of the one part, and *Wm. Horn* and *Rd. Jackson* of the other part, that *John Horn* should withdraw from the business as from the 1st of *March* then instant, in favour of *Wm. Horn* and *Rd. Jackson*, and permit them to use, occupy, and enjoy the said distill-house and other the premises mentioned in the indentures of lease, and the several vats, stills, and utensils of trade therein or thereon, and which vats, stills, and utensils were specified in the first schedule written under that indenture, in consideration of an annuity of 600*l.* to be paid to *John Horn*, his executors, &c. during the life of himself and *Elizabeth* his wife (the now plaintiff) and the life of the survivor, subject to terms and conditions therein after expressed: and reciting farther, that it had been agreed that the debts due to *John, Robert*, and *Wm. Horn*, as late copartners, and also all the horses, carts, drays, and casks of the late copartnership (except the vats, stills, and utensils mentioned in the said first schedule,) should be valued, and purchased by *Wm. Horn* and *Rd. Jackson*; and that a valuation had been made accordingly; by which it appeared that such debts, and the value of such horses, &c. amounted to 1815*l.*: for payment of which a bond had been given by *Wm. Horn* and *Rd. Jackson* to *John Horn*; and that *Wm. Horn* and *Rd. Jackson* by another bond, had been bound to *John Horn* in 5000*l.* conditioned for payment of the annuity of 600*l.* per an-

num to *John Horn* for the lives of himself and his wife the plaintiff,) and the survivor; he, *John Horn*, in pursuance of the agreement, and in consideration of the two bonds and the covenants and agreements after contained on behalf of *Wm. Horn* and *Rd. Jackson*, for himself, his heirs, executors, &c. covenanted and agreed with *Wm. Horn* and *Rd. Jackson*, their executors, administrators, and assigns, that they, *well and truly paying the rents reserved* by the several recited leases, *and performing all and singular the covenants and agreements therein contained* on the lessees' and assignees' parts, and also *duly and regularly paying the said annuity* so secured as aforesaid, should and lawfully might *peaceably and quietly have, hold, use, occupy, possess and enjoy the said messuage, tenement, distill house, and premises* thereby demised and mentioned in a certain deed-poll indorsed on the said first lease, and also the said stills, vats, and things, specified in the first schedule, during the lives of *John Horn* and *Elizabeth Horn*, or the survivor, without any let, suit, &c. of *John Horn*, his executors, &c. or any person lawfully claiming from him, &c. *Wm. Horn* and *Rd. Jackson* by the indenture of agreement, covenanted to pay the rent reserved by the leases, and to perform the covenants. There was also a proviso in that indenture, that *in case the annuity should be in arrear for two calendar months*, *John Horn, his executors, &c. might re-enter the distill-house and premises, and the same with all and every the stills, vats, and things mentioned in the said schedule have again, re-possess and enjoy as in his former estate, &c.* There was also a covenant, that upon the decease of the survivor of *John* and *Elizabeth Horn*. *Wm. Horn* and *Rd. Jackson* should be at liberty to purchase the distill-house and premises for the remainder of the term in the leases, and the stills, vats, and things mentioned in the said schedule. And another covenant that *Wm. Horn* and *Rd. Jackson* should keep the said stills, vats, and utensils in repair: and in case they should not purchase the same, that they should at the end of the agreement deliver them up to *John Horn*, his executors, &c. in good condition, reasonable use and wear excepted. [Then followed the schedule referred to of the different stills and vats, numbered in order, and describing the quantity in gallons which each would contain.] The case further stated, that *Wm. Horn* and *Rd. Jackson* took possession of the premises immediately on the execution of the indenture of agreement, and carried on the trade of distillers; and from time to time paid the interest on the bond and the annuity to *John Horn*, who died about four years ago, and who by his will gave all his property to his wife, the plaintiff, and appointed her sole executrix. Since (a) the death of *John Horn*, neither the annuity nor the interest of the bond for 1815*l.* have been regularly paid; but the plaintiff, as she from time to time was in want of money, and notwithstanding the annuity and interest might not be then due, applied to *Wm. Horn* and *Rd. Jackson*, who paid her different sums on account of such annuity and interest; and also by her order occasionally paid sums to various persons for her use, and supplied her with liquors and spirits as she from time to time ordered any; so that there was a running account between them and the plaintiff. The following memorandum was signed by *John Horn*, and indorsed on that part of the deed in the possession of *Wm. Horn* and *Rd. Jackson*; viz. "I, the within-named *John Horn*, do hereby undertake and agree to accept and take 500*l.* by equal quarterly payments instead of 600*l.* for the first year's annuity within referred to." To this memorandum there was no date, nor did it appear when it was made. The following indorsement or receipt was also written on the said deed, and signed by the plaintiff as executor of *John Horn*; viz. "March 1st, 1802. Received of the within-named *Wm. Horn* and *Rd. Jackson* 500*l.* being one year's annuity due from them this day, for the purposes specified herein." There

(a) What follows down to letter b was added by consent to the case after the first argument.

was also the following indorsement on the same deed signed by *Elizabeth Horn*. "March 1st, 1803. Received of the within-named *Wm. Horn* and *R. Jackson* 600*l.*, being one year's annuity due from them this day for the purposes specified therein." The first memorandum appeared to be in the hand-writing of the solicitor who drew the deed: the two last receipts were in the hand-writing of *Rd. Jackson*. For many months previous to the bankruptcy of *Wm. Horn* and *Rd. Jackson* the plaintiff found great difficulty in obtaining money from them; and she permitted the annuity and interest to run in arrear; and *notwithstanding the same were more than two months in arrear*, the plaintiff did not make any claim to re-enter the premises, as by the deed she had the power to do; but in May 1806, brought an action in this court against *Wm. Horn* and *Rd. Jackson* to recover the arrears of the annuity, as also to obtain payment of the bond for 1815*l.* and interest; to which action they pleaded eight several pleas, upon seven of which issue was joined: and to the eighth plea *Elizabeth Horn* demurred; which demurrer was argued, and judgment given for *Elizabeth Horn*; and notice of trial of the said issues had been given at the time of the bankruptcy; but in consequence thereof, that cause was not further proceeded in; and there was due for the arrears of the annuity and interest on the bond for 1815*l.*, at the time of the bankruptcy, about 600*l.*(a). In April 1806, the plaintiff, after her husband's death, renewed the leases of the several premises. *Wm. Horn* and *Rd. Jackson* occupied the premises, with the stills, vats, and utensils thereon, and carried on the trade of distillers from the time of executing the indenture of the 20th of March 1801 to their bankruptcy. A commission of bankrupt issued against *Wm. Horn* and *Rd. Jackson* on the 26th of July 1806, and they were duly adjudged bankrupts on the 28th; and the messenger under the commission immediately took possession of the demised premises, and also of the vats, stills, and utensils then being thereon. The defendants were afterwards chosen assignees, and an assignment of all the estate and effects of *Wm. Horn* and *Rd. Jackson* was duly made to them; upon which notice was given by the plaintiff to the defendants that the several vats, stills, and utensils were the property of the plaintiff, subject to the supposed interest of the bankrupts therein. The things mentioned in the deed, and comprised in the first schedule, consist of stills and vats. The(b) stills, five in number, were set in brick-work, and let into the ground. Three vats or worm-tubs were supported by and rested upon brick-work and timber, but were not fixed in the ground. Sixteen other vats stood on horses or frames made of wood, which were not let into the ground, but stood upon the floor(c). The vats were of wood, bound round with iron: the stills were of copper; and connected with some of the vats: others of the vats were also connected and communicated with each other by conductors or pipes. Three stills and vats were in the rectifying distill-house. There were also a great number of other vats under the rectifying distill-house; some of which were standing on brick and timber, and others on horses or frames as above; and which were connected with the vats and stills in the rectifying distill-house. Others of the vats stood on horses or frames, as above described. All the vats in the rectifying distill-house stood on their ends; as did nine of those under the distill-house: the other vats under the distill-house lay on their sides or bilge. The defendants contending that the vats, stills, and utensils, in the said first schedule contained, belonged to the bankrupts at the time of their bankruptcy, have sold them as part of the estate and effects of the bankrupts. The plaintiff, contending that the same belong to her as executrix of her late husband, by virtue of his will (subject to the use thereof by the assignees in right of the bankrupts during her life,) has brought this action to recover in damages

(a) See note (a), p. 219.

(b) What follows down to letter c was added by consent to the case after the first argument.

the value of her interest therein. The question was, Whether the plaintiff were entitled to recover? it being agreed that if the plaintiff were so entitled, the amount of the damages should be settled out of court.

This case was argued in *Michaelmas* term last, by *Burrough* for the plaintiff, and *Dampier* contra; and again in this term, by *Williams*, Serjt. for the plaintiff, and *The Attorney-General* for the defendants. The additions to the case which have been noticed were made between the first and second argument.

For the plaintiff, (after stating that the question turned on the stat. 21 Jac. 1. c. 19. s. 10 & 11,) the attention of the Court was called to the preamble to the 11th sect. set forth in the conclusion of the 10th: though it was admitted, that the modern cases had put a construction upon the enacting clause beyond the particular mischief recited. The statute reciting "that it often falls out, that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose of the same as their own;" for remedy enacts, "that if any person shall become bankrupt, and, at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition, as owners;" in every such case, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors, &c. Giving effect to the words of the preamble, the true object was to deprive particular creditors of their specific lien on goods, which having been the property of the bankrupt had been secretly conveyed by him to such creditors, who suffered him still to continue in possession and appear to the world as the owner. That provision was made in the case of bankrupts in order to avoid the doubt which had arisen upon the stat. 13 Eliz. c. 5. against fraudulent conveyances to defeat and delay creditors in general, and which doubt still exists on the statute of *Elizabeth* whether it were not confined, as at common law it certainly was, to avoid the conveyance as against those only, who were creditors of the party at the time. Wherefore the statute of *James* extended the provision to all the creditors, as well those who became such afterwards, as those who were such at the time of the conveyance. But still construing the two statutes together, as made *in pari materia*, many great lawyers have considered that the preamble in the 10th sect. of the stat. 21 Jac. 1. c. 19. controuled the enactment in the 11th section, and confined the operation of the statute to cases where the property conveyed to a particular creditor was before that time the property of the bankrupt himself. Of this opinion was Lord C. J. *Holt* and the Court of K. B. in *L'Apostre v. Le Plaistrier*, Mich. 1708, cited 1 P. Wms. 318, and Lord C. B. *Parker*, and Lord *Hardwicke*, in *Ryall v. Rolle*, 1 Atk. 175. 182. and 1 Ves. 365. 371: though the contrary has since been held in *Mace v. Cadell*, Cowp. 232. Still, however, the Court will not go further than the latter case; nor say that the statute shall attach in every instance where a trader is in possession of another man's goods at the time of his bankruptcy, if he were not held out to the world as the ostensible owner by the real proprietor, as in that case the bankrupt had been; the true owner having there held out the bankrupt as her husband, and having obtained a licence for the public house where they lived in his name. But taking the preamble not to controul the operation of the enacting clause, still, in order to bring the case within that clause, the bankrupts must not have such goods in their possession, order and disposition at the time, by the consent and permission of the true owner, according to the first part of the clause, but they must also have taken upon them the sale, alteration, and disposition of them, as owners, by the same consent, and permission; for these words run through both parts of the sentence; and it must appear either by the terms of the contract between the bankrupts and

the true owner, or by evidence dehors of the nature of the property, or of the place or circumstances of the possession, that the owner trusted the bankrupts with the power of selling, altering or disposing of the goods as owners; or that having the possession, order, and disposition of the goods under such circumstances as might induce the world to believe that they had such a power, the bankrupts did actually sell, alter, or dispose of them, as owners. In *Walker and Others, Assignees of Bean v. Burnell*, Dougl. 317., household goods and furniture, which were left by the assignees under the first commission so long as seven years in the bankrupt's possession; yet having been so left for a special *bona fide* purpose, in order to assist the bankrupt in settling his affairs, and getting in his effects for the creditors; and the bankrupt not having the disposition of the goods so as to sell them; were decided not to be within the statute of *James*. It was admitted even in *Mace v. Cadell*, that every instance of a possession of goods of another by a bankrupt at the time of his bankruptcy was not within the statute; but it was said, that the cases of factors, executors, trustees, &c. were *excepted* cases: but the words of the 11th clause, if not restrained by the preamble, are general, and would include those which are called *excepted* cases, as well as any others: they are not, therefore, excepted by the statute itself in terms, but only by construction, as not falling within the reason of it: the statute only attaching on the possession of goods by the bankrupt when such possession is fraudulent; where the true owner has trusted the bankrupt with the power of selling, altering, or disposing of the goods, as owner. And though perhaps the bare fact of the possession of chattels may be *prima facie* evidence that the possessor is the true owner, and has the power of sale, &c. as owner; yet the contrary may be shewn, and that the possession of the bankrupt was *bona fide*, and consistent with the right of the true owner. A factor is intrusted with the highest power over the goods, the power of sale; but because it is not *as owner* but *as factor*, which is consistent with his possession, and with the rights of the true owner, the case is not within the statute. The same may be said of trustees and executors. So here, the bankrupts had "the possession, order, and disposition" of the goods under the indenture, *as lessees*, and not *as owners*; and they had not the sale or alteration of them at all, nor the disposition of them, *as owners*, so as to affect the property in any way, but only the bare use of them. In some cases the circumstances attending the possession may carry an appearance to the world that the possessor has the sale, alteration, or disposition of the goods, as the owner; as where goods usually sold in a shop or warehouse are exposed to view there; and from thence a power to sell, &c. by the consent of the owner who permits this to be done may be fairly implied: but no such inference can arise here, where some of the vats, &c. were actually fixed to the freehold, and others apparently so, and the rest were used in like manner as those which were fixed, and all of them were numbered. In this case the possession was at least equivocal, so as to let in the truth of the ownership. It was just as likely by the mere view of the things that they belonged to the owner of the premises as to the traders who were in possession. They all formed one entire apparatus for distilling, part of which was actually fixed to the freehold; and therefore the bare possession and use of them carried no greater evidence of title than the possession of the premises themselves. And on this ground *Buller, J.* in *Walker v. Burnell*, Dougl. 320, held that the furniture of the house left in the possession of the bankrupt did not pass under the statute. Wherever the contract between the bankrupt and the true owner, to whom the goods originally belonged, has been *bona fide*, and not made for the purpose of giving him a false credit, and the bankrupt's possession and mode of using the property was consistent with such contract, the case has never been held to be within the statute. In *Copeman v. Gallant*, 1 P. Wms. 320, 1, though Lord *Cowper*

considered that the preamble did not restrain the enacting words of the clause; yet he held the case not to be within it, in regard that the assignment, which was for payment of the debts of the assignor, was with an *honest intent*. In *Ryall v. Rolle*, 1 Atk. 165. and 1 Ves. 349, the property, which originally belonged to the *bankrupt*, was by him mortgaged and conveyed at different times to several persons; he continuing all the time in possession. That was a fraud directly within the express words of the law. In *Mace v. Castell*, Cowp. 232, there was direct evidence of fraud on the part of the true owner; she herself having taken out a licence for the public house, where the goods were, in the name of the bankrupt, to whom she said she was married; and having at first claimed the goods under a bill of sale from him. *Bryson v. Wylie*, Hil. 24 Geo. 3 B. R. note (a). 1 Bos. & Pull. 83, was decided altogether upon the ground of trick and fraud. There was an open sale of a dyer's plant to the bankrupt, and afterwards a private resale by him; notwithstanding which he still continued to keep possession upon payment of a pretended rent. *Gordon v. The East India Company*, 7 Term Rep. 223, was the case of goods invested by the true owner in the name of an officer of one of the Company's ships, as his privilege; whose property they appeared to the world to be; and which was therefore calculated to deceive his creditors. So in *Lingham v. Biggs*, 1 Bos. and Pull. 82, a creditor having taken in execution the furniture of a coffee-house keeper, permitted him to remain in possession of it under a rent; who therefore, appeared to the rest of the world to continue the owner of it in the same manner as before; there being nothing done to notify the change of property; which was clearly fraudulent even within the preamble of the statute. But in that case Lord C. J. *Eyre*, speaking of *Bryson v. Wylie*, said that, notwithstanding that decision, he could suppose that a dyer might be in possession of a plant without being the reputed owner. And he also supported the decision in *Collins v. Forbes*, 3 Term Rep. 316, which had been questioned (a). But admitting that there were some circumstances of fraud in the last-mentioned case, the principle there established, which has not been questioned was, that where the bankrupt was in possession of the goods at the time of his bankruptcy with the consent of the true owner, *bona fide*, for a special purpose, beyond which he had not the right of alteration or disposition, it is not within the statute. The case of *Darby v. Smith*, 8 Term Rep. 82, was considered as an absolute sale of the goods by the trustees of the wife and children to the husband whom they suffered to continue in possession till the day before his bankruptcy without his paying the stipulated instalments. It would have been useless to have discussed any of these cases, if the bare act of possession of the goods of another by a bankrupt at the time of his bankruptcy, were sufficient to bring a case within the statute. Now here by the terms of the deed the bankrupts had no power over the vats, stills and utensils in their possession, except the use and repair of them as lessees: they had not the general, but only a special order and disposition of them by the consent of the true owner: and they had no power of sale, alteration, or disposition of them at all, as owners. But if the consent or permission of the true owner mentioned in the first part of the 11th clause be not carried to the "sale, alteration, or disposition" mentioned in the latter part; at least those words must be intended of an actual sale, alteration, or disposition of the things by the bankrupt, in order to bind the true owner: for the words of the act are "and take upon them (the bankrupts) the sale, &c. "as owners;" which is not pretended to have been done by the bankrupts in this case. Consistently with the deed the lessees could not even

(a) By *Lawrence, J.* in *Gordon v. The East India Company*, 7 Term Rep. 237, who now again intimated great doubts of that case, as did also Lord *Ellenborough*. The former referred to Mr. *Cullen's Observations* on that case, which he said were very sensible. *Cull. Principles of the Bankrupt Laws*, 318.

have removed these goods from the premises demised to any other place, without an implied breach of covenant, to be collected from the whole deed; for they were all scheduled and numbered, and let as an entirety; and if displaced it could not be told how the numbers applied, and the object of numbering them would be defeated.

It was also objected to the plaintiff's title, that the possession of the lessees at the time of their bankruptcy was not consistent with the deed; because they were only to hold so long as they performed the covenants and paid the annuity reserved; and there was a proviso for re-entry in case such annuity was in arrear for two months: and no re-entry had been made, though the annuity was in arrear for a longer time. To this it was answered, that the words of the indenture whereby *John Horn* covenanted that the lessees "performing all "and singular the covenants and agreements therein contained, and also *duly "and regularly paying the annuity, &c.* should quietly possess and enjoy, &c. "the premises, and also the stills, vats," &c. were not words of condition, on the breach of which the lessees were no longer to hold over, but in law were only words of covenant on the part of the lessees, for the breach of which a remedy lay upon the covenant; as was determined in *Hays v. Bickerstaffe*, 2. Mod. 34, 5. Then, though there was an express power of re-entry in case of such arrear, yet it could not have been executed under the circumstances; for there was a running account between the parties; the plaintiff having received money on account of the annuity from time to time, and the bankrupts having also paid bills for her: and this account was not liquidated. But to warrant a re-entry there must be a demand of the precise sum due, which could not be told by the plaintiff at the time. Besides, as in case of rent reserved quarterly, when two quarters have elapsed, the lessor cannot re-enter for the first quarter, but only for the last; having slipped his opportunity for the other, after another quarter has become due: so here the plaintiff could only have re-entered for the last payment in arrear. But supposing in strictness, that the plaintiff might have re-entered, yet as it would not have been prudent to do so, she will stand excused for waiving the exercise of an odious right of forfeiture, against which a court of equity would of course have relieved the lessees, on payment of the arrears; and this, even since the stat. 4 Geo. 2. c. 28. s. 2, if the application for relief were made within six months, *Doe v. Lewis*, 1 Burr. 619.

For the defendants, it was contended that the possession of the bankrupts was not consistent with the deed: for by that, in the event which happened of the annuity falling into arrear, the plaintiff was entitled to enter and take possession of the goods in question; instead of which she left them in the possession of the traders, and brought an action for the arrears, which was defeated by their bankruptcy. As to the difficulty of making a demand for the precise sum before re-entry, the strictness of law in that respect only applies to cases of re-entry for non-payment of rent where the demand must be on the land, and not to the re-possession of goods for non-payment of an annuity for which they were a security, in which case the demand may be made any where. However, if a previous demand of the precise sum were necessary, the difficulty of ascertaining it, occasioned by the act of the annuitant herself, would be no reason why as between these parties she should be excused for not having made it. If she were entitled to possession under the deed in the event which happened, and by taking the necessary measures, whatever they might be, would have been in possession, the subsequent possession of the bankrupts was against the stipulations of the deed: and this brings the case within *Darby v. Smith*, 8 Term Rep. 82, which is very like the present in its circumstances: for there the trustee had a right to enter and re-possess himself of the goods, if the stipulated payments were not made; and having neglected to do so, after default made in all but the first instalment,

the possession of the bankrupt was held to be within the statute; though as between the parties to the contract the transaction was *bona fide*, and no fraud in fact intended. But admitting that the possession of the bankrupts was in pursuance of the deed, it does not follow that their possession was not within the statute. If this were so, every case of this sort might be taken out of the statute. The possession of a mortgagor of goods is not inconsistent with his title, and yet it has never been doubted since *Ryall v. Rolle*, 1 Atk. 165, that it was within the statute. It is the *reputed ownership* of the goods in the possession of the bankrupt which brings the case within the express words of the statute, the avowed object of which was to defeat those secret conveyances, by which personal property is secured to particular creditors, while to the eye of the world it is left in the *possession, order, and disposition* of the bankrupt who by means of it obtains a false credit. It is now fully settled since the case of *Mace v. Cadell*, Cowp. 232, that the preamble does not control the enacting words of the 11th clause of the act. But it is argued, that the bankrupt must not only have the *possession, order, and disposition* of the goods with the consent of the true owner, but also the power of *sale, alteration, and disposition* by the same *consent*. Certainly the bankrupt need not have actually sold and delivered the goods; for then the question would never arise, as was observed by *Eyre, C. J.* in *Lingham v. Biggs*, 1 Bos. & Pull. 87; for the act only gives the assignees of the bankrupt power to appropriate goods in his *possession*. But the same learned Judge says, that "if the man be *reputed owner* of the goods, and *appear* to have the *order and disposition* of them, he must be understood to have taken upon himself the *sale, alteration and disposition* within the meaning of the statute." Neither could it be the meaning of the statute that the bankrupt should be the true owner of the goods, because, as Lord Hardwicke said in *Ryall v. Rolle*, 1 Atk. 183, the Legislature has explained its sense by putting the words *true owner* in opposition to the *reputed owner*. Nor could it mean that the bankrupt should have the *power of sale, &c.* by the *consent of the true owner*; for then his selling or otherwise disposing of them would be no breach of the private contract between them. In every case where any question can arise, the *reputed ownership* of the bankrupt must be limited, as between him and the true owner, by some secret stipulation abridging the general right of disposition: and it was the very object of the act to prevent the operation of such secret engagements, which enabled traders to obtain a false credit by means of the apparent or *reputed ownership* which their visible possession of the goods of others gave them. It is no question, therefore, in these cases, what is the real contract in the deed; for that could not be known at the time to third persons who were dealing with the trader. The only question which can be made, consistently with the words and object of the statute, is, whether the trader in possession at the time of his bankruptcy had the apparent order and disposition of the goods? if to the eye of the world he appeared to be the owner of them, or was, as the statute calls him, the *reputed owner*, the case is within the statute; though in truth there was a secret conveyance or agreement by which the property was made over or secured to another. This, as was said by *Buller, J.* in *Walker v. Burnell(a)*, must always be more a question of fact than of law. When the fact of the *reputed ownership* is clearly ascertained, the law follows of course. Every man, says *Eyre, C. J.* in *Lingham v. Biggs*, 1 Bos. & Pull. 87, who can be said to be the *reputed owner*, has incidentally the order and disposition of goods: and if he be the *reputed owner*, and appear to have the order and disposition of them, he must be understood to have *taken upon himself the sale, order, and disposition*, within the meaning of the statute. And if the real owner do not take such means as may be in his power to prevent the public being imposed upon by such false appearance, that is the very mischief meant to be remedied by the act; and the bankrupt must be taken to

(a) *Dougl.* 317. and vide this noticed by *Eyre, C. J.* in *Lingham v. Biggs*, 1 Bos. & Pull. 89.

have the possession, order, and disposition of the goods by consent of the owner: and the being in possession under such circumstances from whence the order and disposition of the goods may be reasonably inferred makes the reputed ownership. Now here every circumstance of notoriety tended to shew that the bankrupts were the true owners of the goods, whether considering the possession before the indenture of the 30th of *March*, the time and circumstances under which the bankrupts took possession under that deed, the avowed purpose for which it was made, or the continued possession and apparent ownership of the bankrupts after the transfer in the same manner as before. *William Horn*, one of the bankrupts, had been in partnership with *John Horn*, the testator, before the transfer: they carried on business jointly upon the same premises, and had a joint use of the vats, stills, &c., and to the eye of the world at least the property belonged to the partnership, however it might be as between themselves. *Rd. Jackson* had also an interest with *John Horn* in the lease. The business was a losing concern; and *John Horn*, wishing to get out of it, appeared to the world to withdraw himself from it; and *Wm. Horn* appeared to continue in possession of the premises and of the vats, stills, and utensils for carrying on the business, together with *Rd. Jackson*, and to exercise the same acts of ownership as he had done before when in partnership with *John Horn*. But in fact *John Horn* had secretly conveyed this property to *Wm. Horn* and *Rd. Jackson*, saddled with the annuity to himself and his wife, which was likely to ruin the trade more rapidly than before. But there was no notice of the change to other persons dealing with the partnership; the deed was kept secret from them; the object of all the parties being, that the trade might be carried on by the existing partners with the same apparent capital as the old firm, and that the credit of the new partnership might not be lessened by the general knowledge of the fact, that the goods in question were not their property. The secrecy of the transfer was as much for the benefit of *John Horn* as of the continuing partners; for if their credit were shaken, they would be less able to pay the stipulated annuity. In fact the bankrupts did gain a false credit by the possession of the goods in question. There is no fact of notoriety to resist the conclusion that these were the goods of the bankrupts: and the only fact relied on to shew that the property was not theirs is the secret indenture of the 20th of *March* 1801, by which a prior claim on the goods was secured to *John Horn*; but such a secret transfer is of the very species of fraud which the statute meant to guard against. The case of *Bryson v. Wylie*, Hil. 24 Geo. 3. B. R. cited in 1 Bos. and Pull. 83, cannot be distinguished from this in principle. The bankrupt there had the possession of the dyer's plant, but he had not paid for it; he therefore agreed to assign it to the creditor, and to take it again on lease from him. There was no *mala fides* or fraud in the transaction as between those two; and if the interest of no other person had been concerned, it was only just and reasonable that the creditor should have had his security: yet that was avoided by the operation of the statute, as fraudulent in law against the creditors in general. The case of *Darby v. Smith*, 8 Term Rep. 82, is strong to the same point. The case of *Walker v. Burnell*, Dougl. 317, turned, as it seems, on the notoriety of the goods which were left in the bankrupt's possession continuing the property of the assignees under the first commission: but that is a very doubtful case. The honesty of the intent of the true owner cannot be sufficient to protect the goods; for according to the report of *Copeman v. Gallant*, in 7 Vin. Abr. 89, Lord *Cowper* said, "if possession and disposition be given to a person who becomes bankrupt, though no intent of fraud appear; yet, if it give a false credit, there is the same inconvenience as if fraud were intended, &c.; and it matters not whether it were by fraud, or only by neglect, or out of a humour." And this was admitted in *Bucknell v. Royston*, Prec. in Chan. 287, in the case of a bankruptcy.

In the course of the argument *Grose*, J. asked whether there were any usage in the trade for distillers to hire or lease vats, stills, &c. with their premises? To which it was answered by the defendant's counsel, that no such usage appeared; and unless it were expressly found by the case, the presumption would be, that things necessary to carry on the trade were provided by the traders themselves: and that the possession of such things, which were of great value, must naturally give more credit to the distillers than the mere view of the spirits distilled, which often belonged to others. Lord *Ellenborough*, C. J. also observed at the conclusion of the argument, that nothing had been said with respect to the distinction between such of the vats and stills as were affixed to the freehold, and those that were moveable, and would be the subject of trover; between which, he said, the Court thought that there was a material distinction; the words of the statute of *James* being *goods* and *chattels*. And upon asking *The Attorney-General* whether he meant to insist upon the right of the assignees to such of the articles as were fixed to the freehold; and referring to what was said in *Ryall v. Rolle*; and being answered in the negative; his Lordship said, that if the rest of the Court agreed with him in opinion as to the right of the assignees to such of the articles as properly fell under the denomination of goods and chattels, it would be better to leave it to a referee to ascertain out of court the difference of the value for which the verdict should be entered.

Lord *ELLENBOROUGH*, C. J. then proceeded.—The true object of the statute 21 Jac. 1. c. 19. s. 10 & 11, was to make the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the *real* ownership of such goods and chattels, and to subject them to all the debts of the bankrupt: considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods. The stills, it appears, were fixed to the freehold; and as such, we think, would not pass to the bankrupt's assignees under the description of goods and chattels in the statute. But as to the vats and utensils, there is nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm when the business was continued to be carried on by the bankrupts alone in the same manner as it followed the possession of the antecedent partnership when the trade was carried on by *John*, *Robt.* and *Wm. Horn*. Before the deed of the 20th of *March* 1801, though *John Horn* might have had a priority of claim to the stills, vats, and utensils, as between him and his partners; yet to the eye of the world the apparent ownership of them was in the partners, *John*, *Robert*, and *William Horn*. After the deed *John* demised these things to *Wm. Horn* and *Richard Jackson*, who continued to carry on the trade after he had retired from it, finding it to be a losing concern; and instead of reserving a rent, he reserved an annuity payable to himself and his wife and the survivor of them, with a liberty to the new partners to purchase these articles on the death of such survivor. Under this agreement *Wm. Horn* and *Richard Jackson* continued in possession of the property, carrying on the trade in the same manner as was done before; and to the eye of the world the property of these goods appeared to be vested in them in the same manner as it appeared to be in the former partnership. As between the parties to the contract, the new partners could not indeed sell, alter, order or dispose of the property but according to the provisions of that deed; but as to the world in general they appeared to have the same right over it which the former partners had. Had they not then the *reputed* ownership? If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have

carried the reputed ownership. But in the absence of such a usage, there is nothing stated in the case which qualifies the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the person who permitted them to hold out to the world the appearance of their being the real owners ought to be answerable for the consequences, and was so intended to be by the statute. For some time it was *vezata questio* whether the preamble controuled the enacting words, so as to confine the operation of the statute to cases where the bankrupt was the original owner of the property conveyed by him to the particular creditor: but the enacting words have been long held not to be so controuled. Here, in fact, the bankrupts were only lessees of these goods; but that was a secret known only to the parties themselves; and nothing appeared to teach the world that the bankrupts could not bind the property to the full extent of it. This is a case, then, which comes within the fair construction of the enacting words. The case of *Bryson v. Wylie* bears strongly on the present; for that was not the case of a mortgagor keeping possession of goods, as might be supposed from the note of what was said by Lord *Mansfield*: but the plaintiff, who was the original owner of the plant, finding that *Simpson*, to whom he had sold it on the security of two promissory notes, was not able to pay the notes when due, agreed to take back the plant and give up the notes, and to let the plant to *Simpson* at a rent: under which agreement *Simpson* continued in possession of it up to the time of his bankruptcy. Mr. Justice *Buller* there distinguished the case from that of a banker or factor, who, by the course of trade, must have the goods of other people in his possession; and therefore it did not hold out a false credit to the world. He meant therefore to say, that where the possession did hold out a false credit to the world, there the statute would follow it, and attach upon the goods. And the cases of *Mace v. Cadell*, and *Lingham v. Biggs*, are authorities to the same purpose. The principle to be deduced from all of them is, that where the reputed ownership of the goods in the trader is permitted to be held out to the world, it shall, with respect to the world, be considered as the real ownership. I do not enter into the question, whether the bankrupts' possession were consistent with the deed; because that would only apply to the time after which the plaintiff might have re-entered for nonpayment of the annuity. Her not doing so might perhaps be argued as more distinctly shewing her intention to exhibit the apparent ownership of the bankrupts to the world: but I lay no stress on it; for in my view of the case, however consistent their possession might have been with the deed, it would only have shewn that the deed itself was the fraud which the statute meant to guard against. The principle is, that in all cases where, by the consent and permission of the true owner of goods, a trader in possession has the apparent ownership, and incidental to that the order and disposition of them; and no other circumstance appears to controul such apparent ownership, and shew that the trader was not the real owner; the true owner permitting the trader to exhibit this appearance does it at his peril.

GROSE, J. The case of *Mace v. Cadell* has put a construction upon the statute, which has ever since settled, that where the real owner of goods suffers a trader to have the reputed ownership, so as to have the apparent order and disposition of them, and the trader becomes bankrupt, the statute gives the property to the assignees for the benefit of the creditors. I only doubted whether the stills which were fixed to the freehold would pass under this statute; but it is now agreed that they do not. But with respect to the other articles, it is impossible to distinguish this case in principle from the current of those which have been decided, which have gone upon the ground, that where the real owner enables a trader to acquire credit by having the possession, and apparent order and disposition of goods with respect to the world, he does in effect permit such trader to take upon himself, and he has with respect to the

world, the apparent sale, alteration, and disposition of the goods, within the meaning of the statute.

LAWRENCE, J. The question in these cases, as was observed by Mr. Justice *Buller* in *Walker v. Burnell*, is rather a question of fact than of law. And therefore it seems more proper in such cases to leave it to the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time; for if the true owner suffer a trader to have the reputed ownership of goods left in his possession, and he become bankrupt, the statute says, that the property shall go to his assignees. In this case, therefore we are rather called upon to consider, as upon a motion for a new trial, what conclusion a jury should have drawn from this evidence, than to consider a dry question of law. The facts stated are, that one partner, upon retiring from business leases to others who continue it, (one of whom had been in partnership with him before,) certain stills, vats, and utensils proper for carrying on the business, and which had been used by the former partners. The new partners become, in consequence, to the world the apparent owners of the property. It may happen from the course of certain trades, that masses of machinery are let out by the owners to the mechanics engaged in them, and the notoriety of such a usage in the trade may rebut the presumption of ownership which would otherwise arise from the possession: but in general the possession of utensils of trade must be taken to be by the owners of them. And I agree, that nothing turns upon the question whether or not the possession of the bankrupts in this case were consistent with the deed under which they claimed from *John Horn*: for the very object of the statute was to prevent the true owner from enabling another to hold himself out to the world as such, and thereby gain a false credit: and this being a secret deed, the world could know nothing of its contents. It was pressed in the course of the first argument, that the reputed ownership mentioned in the statute must be understood where there was a power of sale confided to the bankrupt by the true owner; and reference was made to the words of Lord *Mansfield* in *Mace v. Cadell*, that the statute did not extend to all possible cases where one man had another man's goods in his possession, as the case of factors, &c. who have the possession as trustees, &c. to sell for the use of their principal: "but the goods must be such as the party suffers the trader to sell as his own." But this last expression was evidently used in contradistinction to the case of factors, &c. who sold for other persons, and not for themselves. And he could not have meant to lay it down generally: for that was not the case of a sale; but the facts there were, that the owner let the bankrupt into her house, where he passed as her husband: but she never gave him the power of selling the goods, and he never had sold them: yet by treating him as her husband she had given him the reputation of being the owner of the goods: which was held to bring the case within the statute. As to the case of *Bryson v. Wylie*, on which my Lord has observed, Lord *Mansfield* certainly considered the whole as a trick and contrivance to evade the statute; and what was said by Mr. Justice *Buller* goes the whole length of our opinion in this case: that a factor, who must in the course of his business have other person's goods in his possession, does not thereby gain a false credit: but that where the conduct of the true owner enables another in whose hands the goods are to hold out to the world the reputation of ownership, he thereby gives that other a false credit to the extent of the property so confided; for which the statute meant to make him responsible. It is often a question of fact whether the possession of goods do hold out a reputed ownership in the possessor, as in the case of furniture in lodgings. In the present case, the opinion which we have formed from the facts stated will make it necessary to inquire which of these articles are fixtures, and which are not: and for the value of the fixtures when ascertained, and beyond that, for the damage which may have been done to the house in removing the fixtures, the plaintiff will be entitled to recover.

LE BLANC, J. The question is, whether the bankrupts having obtained the reputed ownership of the moveable utensils of the trade by possession of them before and at the time of the bankruptcy, acquired the real ownership by the statute for the benefit of their creditors? I lay out of consideration the question of re-entry of the plaintiff; for I do not think that it makes any difference in this case. This decision will only be an authority for a case where the bankrupts were in possession of utensils necessary for carrying on their trade under a lease; and where there was no usage of the trade for the trader to have such utensils let to him on hire. Wherever such a usage of trade may prevail, the case may deserve another consideration. I must take it upon the facts here disclosed, that *John Horn* was the owner of the utensils in question before the deed of *March 1801*; though that fact is very clumsily stated in the case: the Court however considers, that by some means or another, which do not distinctly appear, these utensils were the property of *John Horn*: and he demised them to the bankrupts, who were to carry on the trade after he withdrew from it; and without these articles they could not have carried on the trade; and there is no usage in the trade for letting such utensils. The question then is, whether under these circumstances, the bankrupts had the possession, order, and disposition of the goods by the consent of the true owner? I think they had. For though there are many exceptions, as in the case of factors, bankers, lodgers, and others who are known to have the goods of other persons in their possession; none of which, it is true, are expressly excepted in the statute; yet the ground of all the exceptions has been, that the possession of such and such descriptions of persons did not carry to the understanding of the world the reputed ownership. The same rule might extend to furniture let with a house, and perhaps even to furniture let without the house to be used there, where such lettings were usual; and by a parity of reason to utensils of trade usually let to the traders; because possession in such cases would not carry the reputed ownership of the property, and would not impose on the world a false appearance of property in the possessor(1).

The verdict to be entered for the plaintiff for the value of the fixtures only, and the damage done in removing them(2).

(1) [Upon an analogous principle it was held in *Martin v. Mathiot*, 14 Ser. & R. 214, that, if the vendor and vendee of a chattel agree that the possession shall pass to the vendee, but the property remain in the vendor till the whole purchase money be paid; such agreement is fraudulent as respects creditors, and the chattel may be levied on as the property of the vendee; and it is immaterial whether it appear that the creditor trusted the debtor on the credit of the goods in his possession or not—W.]

(2) As to what annexations to the freehold are to be considered as fixtures in contradistinction to such as may be removed, see Year Book, Hil. 17 Ed. 2. p. 518. Note at the end of *Harlaken's case*, 4 Co. 62, 4. Co. Litt. 53. a. and n. 5. by Hargr. *Cooke's case*, Moore, 177. *Lord Darcy v. Askwith*, Hob. 284 *Poole's case*, 3 Salk. 368. *Beck v. Rebow*, 1 P. Wms. 94. Ex parte *Quincy*, 1 Atk. 553 [477]. *Cave v. Cave*, 2 Vern 508. *Lawton v. Lawton*, 3 Atk. 18. *Lawton*, executor, v. *Salmon*, East, 22 Geo. 3. cited 1 H. Bla. 259. in notis. *Culling v. Tuffnal*, Bull. Ni. Pri. 84. *Lord Dudley v. Lord Ward*, Amb. 118. *Harvey v. Harvey*, 2 Stra. 1141. *Fitzherbert v. Shaw*, H. Bla. 258. *Dean v. Allalley*, 3 Esp. 11. *Penton v. Robart*, 2 East, 88. *Elwes v. Maw*, 3 East, 88. *Tobey v. Webster*, 3 Johns. 468. *Goddard v. Chace*, 7 Mass. Rep. 432.

The King v. Courtenay.

9 East, 246. Feb. 1, 1808.

The charter of *Saltash* empowers the mayor, justice of the peace, and the rest of the aldermen (seven in all), or the major part of them, of whom the mayor and justice to be two, when it shall seem to them *convenient and necessary*, to elect as many free burgesses as shall please them, and to the same free burgesses, so elected, to administer an oath, &c. The defendant was elected a free burgess in October, 1804, and in December 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of aldermen, and which meeting the mayor *said* was held for that sole purpose, the defendant tendered himself to be sworn in; against which three aldermen protested, one of whom immediately left the assembly; but before the other two protesters withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant. Held,

1. That the swearing in of the burgess might well be at a time subsequent to the election; he having had a present legal capacity to be sworn in at the time of his election and therefore not like the case of an infant elected.
2. That the act of swearing in, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of the majority of the mayor and aldermen, by whom such act was required to be done, whensoever, and howsoever assembled, and without any previous summons for this purpose; there being no dissent by the majority at the time when the oath was so administered.
3. Though three, an equal number of those first assembled, *protested* against the defendant's being sworn in when he first tendered himself to take the oath, yet one of the protesters having withdrawn, it was competent to the majority who remained to administer the oath; no vote having been come to by the major part at first assembled to preclude the body from doing the act at that meeting.
4. *Quære*, Whether, if it be found against a defendant in *quo warranto*, that though duly elected, he was not duly sworn in, there can be any other judgment against him than of *ouster absolute*; there being no instance of a judgment of *ouster quousque*.

AN information in nature of a *quo warranto* was filed against the defendant, calling upon him to shew by what authority he claimed to be a free burgess of the borough of *Saltash*; which stated that *Saltash* is an ancient borough, incorporated by the name of the mayor and free burgesses of the borough, &c.; that there is an indefinite number of free burgesses: and that the defendant, on the 18th of December, 47 Geo. 3, used and exercised, and usurped the office of a free burgess of the borough, and still doth, &c. without any legal warrant. The defendant in his plea set forth a charter granted by his present majesty, in the 14th year of his reign, whereby he incorporated the village of *Saltash* by the name of the mayor and free burgesses of the borough of *Saltash*; and thereby granted that one of the aldermen to be elected in the manner therein mentioned, should be the mayor; that there should be six other free burgesses of the inhabitants of the borough, to be elected as therein mentioned, besides the mayor for the time being; viz. seven capital free burgesses of the inhabitants of the borough in the whole, who should be the aldermen and council. That the mayor of each preceding year should be a justice of the peace until a new mayor should in due manner be elected and sworn. That it should and might be lawful for the mayor and justice of the peace, and the rest of the aldermen for the time being, or the major part of them, (of whom the mayor and justice of the peace were to be two,) from time to time, and at all times thereafter, when and so often as to them it should seem *convenient and necessary*, to *nominate*, elect and prefer, so many and such persons to be free burgesses as should please them; and to the same free burgesses so elected to administer an oath faithfully to execute all things which in the place of a free burgess belonged to be done; and this without any commission or further warrant to be obtained from the king, &c. The plea then stated the acceptance of the charter: and that afterwards, on the 1st of October, 1804, John Buller, Esq. then being mayor,

John Cleaveland, Esq. Justice of the peace, and *R. Hickes*, *R. Thomas*, *James Buller*, and *J. Gaborian*, Esqs. aldermen, assembled at the *Guildhall* of the borough to nominate and elect free burgesses, did nominate and elect the defendant a burgess; and that being so elected, the defendant afterwards, and before his user or claim of the said office, on the 18th of *December* 1806, at the *Guildhall*, before the said *James Buller*, then being mayor, the said *John Buller*, then being justice of the peace, and *S. Drew*, Esq. and the said *R. Hickes*, *J. Cleaveland*, and *J. Gaborian*, then being aldermen of the borough, was duly sworn into the said office of a free burgess, and took the oaths prescribed by the charter; by virtue whereof the defendant claimed to be a free burgess of the borough.

The replication took issue on several facts stated in the plea; 1st, that the said *John Buller*, *J. Cleaveland*, *R. Hickes*, *R. Thomas*, *James Buller*, (the aldermen), and *J. Gaborian*, did not duly assemble to nominate and elect free burgesses in manner and form as pleaded. 2dly, That they did not nominate and elect the defendant into the office of a free burgess, in manner and form, &c. 3dly, that the defendant was not duly sworn into the said office in manner and form, &c. 4thly, That the mayor and justice of the peace, and the rest of the aldermen for the time being, or the major part of them, (the mayor and justice of the peace being two) did not administer such oath to the defendant, nor was the defendant sworn, as by the charter is required. On all which facts issues were joined.

At the trial at *Bodmin*, the first and second issues, upon the due assembling of the mayor, justice and aldermen for the election of the defendant as a free burgess, and the fact of his election by the same persons in manner and form as alleged in his plea, were found for him.

As to the 3d and 4th issues, upon the fact and the regularity of the defendants having been sworn into the office of a free burgess, the jury found a special verdict to the following effect: That on the 18th of *December* 1806, the place of one of the aldermen being vacant, *James Buller*, the mayor, *John Buller*, the justice of peace, *R. Hickes*, *J. Cleaveland*, *S. Drew*, and *J. Gaborian*, aldermen of the borough, (being the two *quorum* officers, and six out of the seven aldermen,) and divers free burgesses, were assembled in the *Guildhall* of the borough, on due notice, in obedience to a writ of *wandamus* issued out of *B. R.* commanding them to proceed to the election and swearing in of an alderman of the borough, in the room of *R. Thomas*, deceased. That at such meeting the defendant came and offered himself to be sworn in to the office of a free burgess, and to take the usual oaths; grounding such claim on his election thereto of the 1st of *October* 1804; the mayor having before that time said that the meeting was for the sole purpose of electing an alderman. That *R. Hickes*, *S. Drew*, and *J. Gaborian*, (three of the aldermen,) on the defendant's so offering himself to be sworn in, protested against his being sworn in, and against doing any thing at that meeting except electing and swearing in an alderman; for which, as they alleged, the meeting was held; and delivered to the mayor a written protestation as follows—"we hereby protest against every proceeding of the Court this day unconnected with the election of an alderman. 18th *December* 1806, (signed) *R. Hickes*, *J. Gaborian*, *S. Drew*," (together with the names of 16 free burghers, and directed) "To the mayor of *Saltash*, the justice, the aldermen, and free burgesses of the said borough." That the three aldermen, *R. Hickes*, *S. Drew*, and *J. Gaborian*, then rose to leave the room; but the mayor proceeded to administer to the defendant the oaths used and required at the swearing in of a person duly elected into the office of a free burgess: which oaths were so administered to the defendant after *R. Hickes* (one of the three protesting aldermen) had withdrawn, and before *S. Drew* and *J. Gaborian* (the two other protesting aldermen) left the room; which they did immediately afterwards. But whether the defendant were under those circumstances duly sworn into the said office

of a free burgess, as alleged by him in his plea; or whether the mayor, justice of peace, and the rest of the aldermen, or the major part of them (the mayor and justice being two) did administer such oath to the defendant, and the defendant were sworn, as by the charter is required and by the plea is supposed, the jury prayed the advice of the Court in point of law.

This case was argued in the last term, when

Adam, jun. for the prosecutor, contended, that the defendant was not duly sworn into the office of a free burgess on three grounds: 1. because the swearing in was not at the same time as the election. 2. Because the defendant was sworn in at a corporate meeting summoned for a different specific purpose, and there was not the consent of the whole body to the act at the time, so as to cure the defect of summons for this purpose. 3. Because he was not sworn in by the mayor, justice of peace, and the rest of the aldermen, or the major part of them. First, the election and swearing in must be *simul et semel*. This was so considered in the *King v. Carter*, Cowp. 220—7, where the words of the charter of *Portsmouth* were in substance the same as in this case. [Lord *Ellenborough*, C. J. The question in judgment there was, whether the corporation could elect an *infant* into an office who was *incapable* of taking it at the time.] Some of the Judges, particularly *Aston, J.*, went upon the ground that, by the true construction of the charter, the swearing in was intended to be done at the same time as the election, as if it were one continuing act. And the same intention is to be collected from the direction in this charter to elect free burgesses when it should seem "*convenient and necessary*" to the corporation. For if at any time it is *necessary* to elect, it must be equally necessary that the persons elected should immediately take upon themselves the office and be sworn in; otherwise the swearing in at a future time will not be such as will supply the necessity; and the corporation are accordingly directed in the same sentence to administer the oath to the burgesses so elected, without adding when it shall be convenient; the charter contemplating that the power of filling the office should be completely executed at one and the same time. The general convenience of the thing is also in favour of this construction; for if the swearing in be left to any future time at the pleasure of the persons elected, the corporation, having no means of compelling them to come in and be sworn, might be dissolved in the meantime for want of sufficient numbers: and at a great distance of time doubts might arise as to the identity of the persons so nominated. 2dly, The corporation having been assembled for the specific purpose of electing an alderman, and which was declared by the mayor to be the sole purpose of their meeting, could not do any other act unconnected with that purpose, without the concurrence of the whole body. For which he cited *Machell v. Nevins*, 2 *Ld. Raym.* 1366; *Rex v. Wake*, 1 *Barnard*, 80, *Rex v. Carlisle*, (a) and *Rex v. Theodorick*, 8 *East*, 543. : and in answer to an observation from the Bench, that these were cases of elections; he argued that there was a distinction in principle between proceeding to an election, and to a swearing in, where the corporation was summoned for another distinct purpose. And the objection, he said, applied with peculiar force to a corporate meeting assembled to do a specific act in obedience to a writ of *mandamus*, where the swearing in of the defendant interrupted the proceeding which it was the duty of the assembly to despatch, and thereby endangered its continuance. 3dly, And principally, he objected, that the defendant was not sworn in before the mayor, justice and aldermen, or the major part of them, as required by the charter, being the same body who have power to elect. The consent of the body by whom the swearing in is required to be is necessary to its validity.

(a) 1 *Str.* 385. and vide 8 *East*, 544.

ty; and therefore in *Rex v. Ellis*, (a), the swearing in was held to be bad, because the mayor before whom it was to be done, though present, was not assenting: and it was there said that there was no difference between a swearing in *by* and *before* the mayor. The same objection prevailed in the case of the Duke of Bedford, 1 Barnard. 242, 280, to whom the oath of office of governor of the Bedford Level was administered by the registrar, in the presence indeed of the six bailiffs by whom it was required to be administered, but not by their consent; for they endeavoured to go away, but the door of the room was shut on them, and they were compelled to remain while the Duke was so sworn in. Now, though it be sufficient if a majority of each integral part assemble, and a majority of those so assembled consent to the swearing in; yet here was no such consenting majority; for out of the six aldermen assembled three were not consenting to the act; and these were only present by the compulsion of the *mandamus* for another purpose, and protested against the defendant's being sworn in. But it may be said, that after one of the three had withdrawn, there was a competent meeting of five out of the seven aldermen, of which three, the major part of the five, were competent to consent to the act. But when the defendant offered himself to be sworn in, all the six were present; and then the proposal was in effect negatived; and the act was only done after all the three protesting members had risen to go out of the room, though in fact, before two of them had actually quitted it; but the whole must be taken together, as done *uno flatu*; and then either there was not a majority of those present consenting, or there was not a majority of the integral part in effect present when the oath was administered, but it was done by surprise and fraudulently; and especially as no previous notice had been given of a meeting for this purpose.

(a) 2 Stra. 994. The following Report of this case, from Mr. Ford's Notes, is more full than that in *Strange*.

REX v. ELLIS, M. 8 G. 2. B. R.—*Quo warranto* to try his right to be mayor of *New Romney*; one issue sent to trial was, if duly elected; this was found for the defendant. Another was, if duly sworn; and this was found for the king. And the defendant moved for a new trial upon a supposition that Eyre, C. J., who tried the case, had given a wrong direction to the jury. The evidence was, that after the election Mr. Ellis came to be sworn, but the old mayor refused him: however, in the presence of the mayor, who still dissented, the town clerk, the usual officer to administer the oath, gave the book to the defendant, who repeated the oath after him: and the charter requiring the new mayor to be sworn *before* the old one, the question was, if this were not a good swearing in within the charter?

Strange urged, that the charter was, "*before*" and not "*by the mayor*:" so that the swearing in agreed with the words of the charter: and, as this fact is, was also agreeable to the intent of it: for the defendant being fairly elected, the crown could never design to enable the person who is to administer the oath of office to exclude him: but as the election is the foundation of the party's right, whenever that is indisputable, the mayor ought to swear in the party elected; and consequently, upon refusal to do his duty, the mayor elect, if he can procure himself to be sworn within the words of the charter, is fairly and legally sworn. And it was urged that, if the court should be of another opinion, mayors or other officers who are, ill-disposed will for the future meet with encouragement to transgress their duty in this point: when it comes to be known that the officer has it in his power to reject or to admit the party elected, there will be people enough ready to engage in a piece of dirty work.

Lord HAWKINS, C. J. The title to every office is grounded on two things; the election of the party, and his being sworn into the office: there is no difference in the world between swearing in *by* and *before* the mayor: in either case the mayor is equally entrusted with the swearing in of his successor; and if he deny to swear him in, though ever so fairly elected, he cannot have any right to his office. The administration of the oath by the town clerk against the commands of the mayor was as void an act, as if, in case this court were the proper place to administer the oath in, one of our officers had wilfully given the oath against the order of the Court: it is the consent of the Court that establishes or makes void the act of swearing. As to the encouragement this opinion may give to presiding officers, I apprehend it can be of no effect; they all know that they are still subject to the power of this Court, which will by *mandamus* compel an execution of their duty. The defendant should have brought his *mandamus*, and not have relied on such a swearing in; and then he might have been legally sworn in. As it is, the direction was right, and the issue is well found; so there is no reason for a new trial; with which the other Judges agreed. So it was denied.

Another point was made in argument, upon which however no judgment was given; whether, supposing the swearing in of the defendant to have been invalid, there should be judgment against him of *ouster absolutely*, or only *quousque* he should be legally sworn in. And *Adam* contended, that the judgment should be of *ouster absolute*; and this as well upon the words of the stat. 9 Anne, c. 20. s. 5. which says, that the Court shall proceed as well to give judgment of *ouster* against, as to *fine*, any person found guilty of usurping an office; and wherever there is judgment to *fine*, there must be judgment of *ouster absolute*: as also upon the want of any precedent or authority for entering up a judgment *quousque* in such a case, where a defendant has set up a title to an office, which has been found against him. And he referred to *Rex v. The Mayor of Penryn*, 1 Stra. 562, and *Rex v. Hearle*, 1 Stra. 625; and observed, that though *Reynolds, J.* so far differed from the rest of the Court in *Hearle's* case as to consider it no new thing to meet with instances of judgments *quousque*; yet it was plain, that he must have confounded judgments of *seizure quousque*, which were frequent enough, with judgments of *ouster quousque*, of which none of the other judges had ever heard. And he must have been afterwards satisfied of his mistake; for in *Rex v. Reek*, 2 Ld. Ray. 1447. 2 Stra. 952. *Rex v. Buddle and Taylor*, upon a trial at bar before the same judge as one of the Court, it having been found on the 4th issue, that the defendant was not sworn and admitted into the office of burgess; the Court agreed, that though the other issues were found for him, yet there must be judgment of *ouster* on the authority of the *King v. Pinder*, mayor of *Penryn*. And that is in point; for though the issue on his due election to the office was found for him, yet the second issue on the swearing in being found against him, judgment of *ouster absolute* was pronounced, which was affirmed by the House of Lords. He also observed, that there was no precedent of a judgment of *ouster quousque* in the records of the Crown Office; and that such a judgment would be wholly inoperative; for it would only suspend the party from the exercise of his function, which the law, without any such judgment, would do, until he chose to come in and be sworn; but still the corporation could not compel him to be sworn, nor elect any body else into his office, as if vacant.

Dampier, contra, in answer to the first objection to the defendant's title, that the election and swearing in of the defendant were not *simul et semel*, founded on what was said by *Aston, J.* in *Rex v. Carter*, Cowp. 227, distinguished this case, where the person elected had a present capacity of being sworn in, and of perfecting his title at the time, from that, where the election was of an infant only five years old, who was then incapable of being sworn in and of executing the office. And it was there admitted by Lord *Mansfield*, that absentees, who of course could not be immediately sworn in, might be elected: Such a construction would in effect confine the choice of *burgesses* to the *inhabitants* of the borough; which the charter has not done; though the choice of magistrates is so confined. As to the second objection, that the corporate meeting having been called for another purpose, the consent of the whole body was necessary to legalize the swearing in; this rule has only been applied to acts of judgment and discretion, and not to mere ministerial acts, such as the swearing in of one before elected, which this Court would compel to be done by mandamus absolute in the first instance. The declaration of the mayor that the meeting was only for the purpose of electing an alderman, would not invalidate the swearing in, if the defendant had a right to require it. As to the third objection, that the majority of the body before whom the oath is to be administered did not assent to the swearing in; supposing such assent to be necessary where the act is merely ministerial, and may be performed any where within the borough, and was performed by the principal officer present, who was the proper person to administer the oath; at any rate, the Court would require the most express and formal dissent, where it was the obvious

duty of those present to do the act, and which this Court would have compelled them to do. Now the protest of the three aldermen was against all acts unconnected with the election of an alderman: (The Court observed, that it did not appear whether the swearing in of the defendant were unconnected with such election.) Even if it were, the effect of the protesting parties, remained; and when one of them (*Hicks*) went away before the meeting broke up, he could not leave his vote behind him. His protest was only a signification of what he meant to do, namely, to vote against the swearing in of the defendant whenever it was proposed to be done; but which he went away without doing. To make his opposition effectual he should have stayed and voted against the act; for, on his retiring, three became a majority of the five who remained. In *Oldknow v. Wainwright*, 2 Burr. 1017, and *Rex v. Withers* there cited, 1b. 1020, elections of officers by the minority of those present; the majority not voting against the candidates nominated, nor for any other candidates, but only protesting against any election; were held good. If the swearing in were a deliberate act, *Hicks* ought to have stayed and assigned his reasons against it; in order, if right, to convince his brethren; or to have been convinced by them, if wrong: the rest might have satisfied him that it was a mere ministerial act, and that he was bound to complete the title which he had helped to confer.

Upon the form of the judgment to be entered, if against the defendant, whether of ouster absolute, or quousque; he said, that the cases cited against the latter were of *annual* officers; but where a right to the freedom of a corporation may be gained by election, by birth, or apprenticeship, it seems strange and unjust to say, that because the party happened unwarily to be sworn in at a meeting improperly convened or constituted, he should lose his former privilege for ever, if afterwards ousted by *quo warranto*. All the cases were considered in *Rex v. Clarke*, 2 East; 75, 84, who having been ill sworn in, had afterwards disclaimed upon an information filed against him for usurping the office: and though having submitted to a judgment of complete ouster, he was held to be concluded from setting up again his original right; yet Lord *Kenyon* intimated, that there might have been a judgment quousque only against him; and referred to *Rex v. Biddle*, Stra. 962, as turning on that distinction. He admitted, however, that the latter case did not come up to the point for which it was referred to in *Clarke's* case; for in *Biddle's* case, the defendant only confessed the usurpation of the office for the former part of the time stated in the information.

Adam in reply, as to the last point observed, that there could not have been judgment of ouster in *Biddle's* case; because it appeared on the whole record, that at the time of the judgment to be pronounced, he had a good title to the office. That *Reek's* case was not that of an annual officer. And that the opinion thrown out by Lord *Kenyon* in *Rex v. Clarke*, was extrajudicial. Upon the first point he said, that the reasoning of the judges in *Carters* case was general, and not confined to the case of infants. As to the second, that the swearing in here was part of the election and no more ministerial than the nomination. That acts might intervene which would justify the body in refusing to swear in the party nominated to the office by a majority of votes. As to the third and principal point; that the protest was against the very act of swearing in the defendant, and therefore operated as a direct negative of that act, and not like a general protest against the acts of the assembly, or against any election at the time required by the charter. The case stood over till this term, when

Lord ELLENBOROUGH, C. J. delivered the judgment of the Court. After stating the pleadings and special verdict.

The only question arising upon this special verdict for our consideration is, Whether, under the circumstances stated, the defendant were duly sworn into the office of a free burgess: the validity of his election as a free burgess is

not disputed. The facts, stripped of form, are these: the defendant was elected a free burgess on the 1st of *October* 1804: from that time to the 18th *December* 1806, he does not appear to have offered himself to be sworn in. On that day, when the mayor, justice, and aldermen, being the two quorum officers, and six out of the seven aldermen, were assembled, in obedience to a *mandamus* of this Court to elect an alderman, in the place of one who was dead; the mayor having before that time said, that the meeting was for the sole purpose of electing an alderman; (but when and to whom, and whether to any of the aldermen or not, he had so said; and whether at or before the time of such their assembling any of the aldermen knew him to have so said; or whether, after having so said, he might not have declared to the contrary; does not appear: but the mayor having, at some time before the meeting said to somebody, that the meeting was for the sole purpose of doing the corporate act required by the *mandamus* to be done; all the existing aldermen being assembled, and the whole of the body under the charter; except the only one whose vacancy was then to be filled up; upon the defendant's offering himself to be sworn in, three aldermen, out of the six present *protested* against the doing any thing at that meeting, except the business required by the *mandamus*: whereupon, after one of the three had withdrawn, and before the other two had withdrawn, and whilst five out of seven, (the whole body) and five, out of the existing number of six, who had all met, and still continued together, (though two were in the act of departing,) he was sworn in, such *previous protest* of three of the six notwithstanding. It cannot be disputed but that the number and description of persons assembled were competent to have sworn in the defendant, if they had chosen so to do; and it is equally clear, (unless there be some foundation in law for the first of the points made in argument, on the part of the prosecution; viz. that the swearing in must be immediately consequent upon the election, or *simul* and *semel*, as it was contended it should be;) that this Court would, upon their refusal to swear him in, have by *mandamus* compelled precisely the same body as was then assembled to have met again for the very purpose of swearing him in, and of thereby rendering him a complete burgess. The points made in argument, on the part of the prosecutor of this information, and upon which the defendant's title as a free burgess was endeavoured to be impeached, were three: first, the one just alluded to; viz. that his swearing in and election did not take place at the same time, or rather the one immediately after the other: secondly, that the defendant could not be duly sworn in at a meeting of the mayor and aldermen called for a different purpose: and, thirdly, that he was not sworn in, as the charter required, by the mayor, justice, and aldermen, or the major part of them.

As to the first objection to the defendant's title, that he was sworn in at a time different from that of his election; it is rested on what was said by *Aston, Justice*, in the case of *The King v. Carter*, Cowp. 220, viz. that "in respect of the oath, the election and swearing in are clearly intended to be *simul* and *semel*." That was the case of an election to the office of burgess in the borough of *Portsmouth*, under a charter authorising the mayor and aldermen, "when and as often as it should appear to them to be fit and necessary, to name so many and such persons to be burgesses as they should please; and to the said burgesses so chosen, to administer an oath for their faithfully executing the said office of burgess." It appeared by the pleadings on record, that the defendant, when an infant under six years of age, had been elected a burgess, and sworn in after he had attained his age of 21. And the question was, whether an infant, so elected, were duly elected according to the terms of the charter? which turned upon this, whether the king had by that charter given the corporation a power to grant inchoate rights to infants, who were, as such, under a *present incapacity* of being sworn,

and which rights were to be put into execution upon their attaining the age of 21. So far from maintaining the necessity of an immediate swearing in, Lord *Mansfield* adverts to the *Cambridge* case, lately decided in that court, in which a person absent in *America* had been chosen mayor: and Lord *Mansfield* recognizes the right of a corporation to choose absent members, if it be done fairly and consistently with the charter, and not fraudulently and collusively, as was done in the *Cambridge* case. According to Lord *Mansfield*, therefore, a person capable of being sworn, if present, may be elected, if absent, (and where, on that account, a swearing in could not immediately take place,) if he were in other respects eligible. Lord *Mansfield* therefore clearly holds, that a capable person may be well elected, though his swearing in should not be immediately consequent upon his election. *Ashhurst*, Justice, says, "the persons intended" by the charter are "such as are capable of taking upon themselves the immediate execution of the office: and not persons to be nominated only, and who might or might not act, or be capable of acting in future, as circumstances and events might turn out." And the opinion of Mr. Justice *Aston*, though it is conceived in terms of somewhat greater generality, yet if considered with reference to the case then before the Court, is to the same effect; of which case he says, that it was "not an election, but a contingent nomination, which perhaps might never have taken effect; because the party might not have lived: other persons might "at such a distance as ten years be to swear him in: disputes might arise as to his being the same person," &c. All of which shews that his objection was founded upon a present incapacity of completing the election by a swearing in, and did not apply to the case of a mere omission to complete the election of a presently capable person by an immediate swearing in. The only authority, therefore, which has been cited, as supposed to be in favour of the first objection, viz. that the swearing in was not immediately consequent upon the election, not being found upon examination competent to support it; and as the effect of admitting such an objection in this case would be to exclude, upon the same principle, all absent and otherwise capable persons, as objects of election to corporate offices; for which in practice and reason there seems to be no foundation; we are of opinion that the validity of the defendant's title as a free burgess is not impeachable on this ground. The neglect to be sworn in for a great length of time, as above twenty years after election, might, (as in the case of *The King v. Jordan*, Rep. Temp. Ld. Hardw. 255(a)) be deemed a waiver or refusal to accept the election by the party elec-

(a) In that case the defendant was not sworn into the office of capital burgess till about 25 years after his election, and another capital burgess had in the mean time been elected. According to Mr. *Ford*'s note of this part of the judgment, Lord *Hardwicke* said: "As to the general question which is put, Whether, if a person elected into an office neglect to be sworn into it for a number of years, such an omission is to be considered as a renunciation of his election? Suppose after a long time the office was filled up, should we grant a peremptory mandamus to swear in such an one? Certainly not. By the election the party has neither *ius ad rem* nor *in re*: and this is plain, for he has no legal action to procure himself to be sworn in. By a *mandamus*, indeed, these questions are usually tried; but a *mandamus* is no action, but only an exercise of the authority of this Court over inferior jurisdictions, by which it obliges them to do justice. If it appeared that a person was elected into an office, and his election being signified to him, he should answer that he would not have the office; and thereupon the electors should choose another; this would be an express refusal of his election; and this Court would never enforce it. And I think the defendant's acquiescence in the present case is a direct refusal. If he had been beyond sea, or under any incapacity of taking the office in a reasonable time, that ought to have been shewn: but he is quite able; totally without excuse: and that inchoate, imperfect right, which he gained by the election, is absolutely waived. His acquiescence and neglect to be sworn is a plain evidence that the person elected was unwilling to take the office, and that the body was consenting to accept his renunciation. So I think judgment ought to be given for the king." And it was given accordingly by the unanimous opinion of the other Judges.

ted; but does not vitiate the election itself; for otherwise the question of waiver could not have arisen in that case.

As to the second objection, that the defendant could not be sworn in at a meeting of the mayor and aldermen called for a different purpose; without repeating what has been already observed, as to the insufficiency of the finding of the special verdict in this particular; which is only, "that the mayor had before that time said that the meeting was for the sole purpose of electing an alderman:" and supposing it to have been distinctly alleged, that the meeting was in fact called, and had assembled, for that special purpose only; yet even so, it appears to us that, however true this proposition may be as applied to corporate business of a deliberative or judicial nature, the *merely ministerial* business of swearing in an officer, antecedently well elected, might be proceeded upon by the mayor, in the presence of the majority of the mayor and aldermen, *whenever, and howsoever assembled*; if such majority did not, at the very time, expressly dissent from the doing of that act which the mayor was immediately engaged in performing. Giving the fullest effect to the antecedent protest of the three aldermen, it could amount to no more than a dissent on their part to the swearing in at that precise time when the defendant was actually offering himself to be sworn in; or at most to his being sworn in during such time as they continued to make a part of that assembly; but it could not prevent the majority of a competent number remaining assembled from afterwards, at any time, doing or assenting to the ministerial act protested against, in respect of the same person, if they chose so to do. And the subsequent doing that act by the mayor, (when the aldermen and majority of the whole body, when the quorum officers, as a part thereof, were present, without any actual dissent being expressed by any,) must be taken to have been done with the tacit assent at least of the majority of those who remained and had not objected. On this occasion no question was submitted to the assembly, which, having been considered and voted on, can be treated as having bound and concluded those who had assembled from swearing in the defendant till some future time: and we have only to consider what is the effect of three members of this assembly wrongfully as far as appears in this special verdict, objecting to the defendant's being sworn into his office, though legally entitled, and afterwards quitting the assembly, with such interval of time as to leave a competent number to assent to the mayor's act of swearing in the defendant. Had they all remained with the others so long as they continued assembled; or had they all gone away before the oath was administered; the wrong they intended might have been effected: but it is not to be expected that the Court should not prevent, if it be possible, the defendant from being deprived of a franchise to which he was legally entitled, by a practice contrary to the duty of those who were concerned in it. This is said upon a supposition that such assent was strictly necessary; and that what is laid down in *The King v. Ellis*, 2 Stra. 994, is law, i. e. that a swearing *before, &c.* is the same as a swearing *by, &c.*; and that as it was to be the act (in case, of the mayor,) in that case, of the mayor and aldermen; that *the assent of the party before whom, &c. must go along with it*; which, in respect, to an aggregate body having no deliberative or judicial function to perform on the subject, nor, as far as appears, any thing more to do upon the occasion, than for a majority of them to afford their personal attendance, may admit of some question: unless indeed that case is to be understood as being conclusive on the point.

The third objection (the discussion of which has been in part anticipated by what has been said, as to the effect of the assent of the body called for a different purpose,) is, that he was not sworn in *by the mayor, justice, and aldermen, or the major part of them*. And the case of *The King v. The Duke of Bedford and Others*, 1 Barnard, 280, has been principally relied upon in support of this objection. But the facts of that case are widely different from

those of the present. In that case, the statute required that the six bailiffs, or one of them, *should administer* the oath to the governor after he was elected; instead of which the oath was administered by none of them to the duke, as governor, but by the registrar, in the presence of the six who had been shut into the room after an ineffectual attempt on their part to escape from it: and not only without any consent or authority on the part of *any* of them to the administration of the oath by the registrar, but at a time when their mere presence, during the time of swearing, was enforced by an act of immediate duress upon their persons. In the case now before the Court, the oath was administered by the presiding member of a competent assembly for the purpose: in which act the majority of those who remained, being a sufficient number to make such assembly, virtually acquiesced; according to what was said by Lord Mansfield in *Oldknow v. Wainwright*, 2 Burr. 1021.; as no dissent was expressed by any; and the act being such an one as, if not done, this Court would have presently afterwards upon application for the purpose, by *mandamus*, have compelled them to re-assemble for the purpose of performing, and to have performed accordingly. We are of opinion, therefore, that the swearing in of the defendant, under the circumstances stated, was a due swearing in of the defendant as a free burgess by the mayor, justice, and major part of the aldermen, as alleged in his plea, and as required by the charter.

The Court being of opinion that the defendant was well elected and sworn in; the remaining question made in argument, as to the nature of the judgment which it would have been proper for us to have given if we had been of a different opinion; namely, whether it should have been a judgment of *absolute ouster*, or of *ouster quousque*, does not arise. If it had arisen, it is enough for us to say, that after diligent search, we can find no precedent of a judgment of *ouster quousque* upon the files of this Court.

Judgment for the defendant.

Right, on the demise of John Allen Compton and Others v. Thomas Compton.

9 East, 267. Feb. 1, 1808.

Where there is no connexion by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and there being no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view.

Therefore, where the testator having a son married, and six grand-sons, and three grand-daughters, and three farms, devised *all* his lands to his son *for life*; and after his death gave to his eldest grandson Thomas (the defendant) the *north side of Down Farm*, and to his grand-daughter Frances the *south side* of the same farm; and to his grandsons George and Edmund, and his grand-daughter Elizabeth, "the *upper part of Lain Farm*, equally "between them, so long as they should remain single; but if either married, then to have "paid by the other two 10*l.* a-year for his or her life;" and to his grandsons Edward and John, and his grand-daughters Mary and Ann, "the *lower part of Lain Farm*, equally "between them (which made them tenants in common) so long as they remained single; "but if either married, then 10*l.* a-year (not saying to be paid by the others) for his or "her life;" and then gave the third farm to another grandson; held that on the marriage of Edward, Mary and Ann, their co-devises of the lower part of the Lain Farm, John, who remained single, could not recover the 2-4ths of the farm forfeited by their marriage, as upon the supposition that the 10*l.* a-year for life to each of the devisees so marrying was to be paid by him who remained single; as in the corresponding devise of the other part of the Lain Farm: but the 2-4ths may be chargeable with the annuities of 10*l.* a-year to each in the hands of the heir at law, who was entitled to those shares.

Neither could the grand-children take a fee by implication in the shares so devised to them generally, without words of limitation, merely from the circumstance that an express estate for life was first given to the testator's son and heir at law.

THIS was an ejectment for a farm and lands called the *lower part* of the Vol. V.

Lain Farm, in the parish of *Amport* in the county of *Hants*, on the demise of *John Allen Compton*, on the 27th of *March* 1806. The defendant *Thomas Compton* defended only for three-fourths of the premises: and the lessor of the plaintiff having taken judgment for the other fourth against a casual ejector, the cause was tried as to the three-fourths before *Chambre, J.* at the spring assizes 1807, at *Winchester*, when a verdict was found for the plaintiff, subject to the opinion of the Court on this case. *Thomas Compton*, the grand father of the defendant, being seised in fee of the premises, and of several other farms and lands in *Amport* on the 9th of *May* 1806, by his will devised as follows. "I give unto my son *Thomas Compton* all my lands for his life. I give unto my grandson *Thomas Compton*, after the death of his father, all the north side of my *Down Farm*, being about 250 acres. I give unto my granddaughter *Frances* the wife of *John Weeks*, all the south part, being about 240 acres after the death of her father. I give unto my grand-sons *George* and *Edmund*, and my grand-daughter *Elizabeth*, the upper part of the *Lain Farm*, being about 200 acres, after the death of their father, equally between, as long as they shall remain single; but if either of them marry, then to have paid by the other two 10*l.* a-year for his or her life. I give *Edward* and *John* and my grand-daughters *Mary* and *Ann*, all that lower part of the *Lain Farm*, being about 240 acres, after the death of their father, equally between, as long as they shall live single but if either of them marry, then 10*l.* a-year for his or her life. I give unto my son's wife, if (she) should outlive him 5*l.* a-year out of each of the farms during her life; also the interest of 700*l.* *East India* stock of three per cent. annuities, and at her death to be equally divided among her children. I give unto my daughter *Mary*, the wife of *George Jennings*, the interest of 1400*l.* in the three per cent. *East India* stock; and at her death the money to be divided equally between her son *George* and her daughter *Patty*. I give unto my grandson *Harry*, after his father, the farm called *Old Lodge*. I do make my son executor." The testator died in 1791: all the devisees survived him, as did *Frances* the wife of *Thomas Compton*, the son. *John Allen Compton*, the lessor of the plaintiff, is the person called in the will *John*. *Thomas Compton*, the son, after his father's decease, entered into the several lands devised to him, and was possessed thereof till his death in 1795. *Frances Compton*, his wife, survived him: and so did her children, *Thomas Compton*, the defendant, *George*, *Edmund*, *Edward*, and *John Allen*, the lessor of the plaintiff. *Elizabeth*, *Mary*, and *Ann*, are still alive. *Thomas Compton*, the defendant, who is the heir at law of the testator, and of *Thomas Compton* the son, took possession of the premises in question, on the death of his father, and still holds them. *Frances Compton*, the widow of *Thomas* the son, is still alive, and has been regularly paid the annuities given to her by the will, since her husband's death. *Edward*, *Mary*, and *Ann*, all married before the day of the demise in the declaration. *J. A. Compton* is still single. The question was, Whether *J. A. Compton* took any and what estate in the three-fourths of the Lower part of *Lain* farm, upon the marriage of his brother *Edward* and his sisters *Mary* and *Ann*? and if the plaintiff were entitled to recover the three-fourths, or any part thereof, the verdict was to stand: if not, a nonsuit was to be entered.

This case was argued in *Michaelmas* term last, by *Dampier* for the plaintiff, who mentioned *Andrews v. Southouse*, 5 Term Rep. 292, as being most like the present case: and by *Pell* for the defendant, who referred to *Doe v. Child*, 1 New Rep. 345, where Lord C. J. *Mansfield* mentioned as the result of all the cases, that an heir at law was not to be disinherited unless by words of limitation, or by expressions which directly, or by inference beyond all doubt, shew an intention to give an estate in fee to the devisee.

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court.

The question in this case depends on the construction of a very ill drawn

will, from which, if it be in the power of the Court to collect the intent of the testator, without any rational ground of doubt, it will be its duty to give it effect; but on the contrary, if the Court can only form conjectures of his intent, the title of the heir at law must prevail. From what is stated in this case it appears, that the testator, *Thomas Compton*, who was the grandfather of the defendant, having, at the time he made his will, a son living, who was married to a woman, who has survived him; and being seised of three farms, one called the *Down farm*, another called the *Lain farm*, the third called the *Old Lodge*; and being possessed of considerable personal property in the funds; and having six grand-sons, and three grand-daughters; devised to his son all his lands expressly for his life, and made him his executor. And after the death of his son he divided his lands among his grand-children in the following manner; that is to say, to his grand-son *Thomas*, the defendant, who, on the death of his son, became his heir at law, he gave the *north side* of his *Down farm*, without using any words of limitation; the *south side* of the *same farm*, he gave in like manner to his grand-daughter *Frances Weeks*; the division so made being nearly an equal one. To his grand-sons *George*, and *Edmund*, and to his grand-daughter *Elizabeth*, he gave the *upper part* of his *Lain-farm*, equally between them, *so long* as they should remain *single*; but if either of them *marry*, then to have paid them by the other two 10*l.* a-year during his or her life. He then gave "to his two grand-sons *Edward* and *John*, and his grand-daughters *Mary* and *Ann*, the *lower part* of the "*Lain farm* equally between them, *so long* as they should remain *single*;" but if either of them *marry*, then 10*l.* a-year for his or her life:" and to his "son's wife, in case she should outlive him, 6*l.* a-year out of each of the *farms* during her life. And after making some pecuniary bequests, he gave to his grandson *Henry*, after the death of his father, the farm called the *Old Lodge*. The case then states the death of the devisor, without altering his will, and that of his son, who survived him. That his grandson *Edward*, and his grand-daughters *Mary* and *Ann*, have *married*; but that his grandson *John Allen Compton*, the lessor of the plaintiff, remains *single*; and that the defendant has entered upon the *lower part* of the *Lain farm*, to recover which *John Allen Compton* has brought this ejectment. And the question is, Whether *John Allen Compton*, the lessor of the plaintiff, took any and what estate in the 3-4ths of the *Lower-Lain Farm* upon the marriage of his brother *Edward* and his sisters *Mary* and *Ann*? It will be observed, that by this will the testator gave to his son all his lands expressly *for life*, and repeating the words, "*after his death*," in every one of the subsequent devises, divides those lands among his grand-children, without using any words of limitation, or in any way describing the period during which it was his intention that they should enjoy them. From whence a person, not conversant with the rules laid down for the construction of instruments, would probably be led to infer, that he meant the grand-children should in some way take the whole interest in the several parts respectively devised of them: and that his purpose was completely to dispose by his will of the whole of his lands; not meaning that any thing should be claimed by his heir in that character. And it is by no means improbable but that such was his intent. But, Mr. *Dampier*, who argued for the plaintiff, felt that the mere circumstance of restricting the interest given to the son *to his life*, and the giving the remainder to the grand-children, generally, without such restriction, would not be sufficient; and therefore he endeavoured to shew that the defendant was not entitled to the 3-4ths of the land in question from other parts of the will: relying particularly on the devise of the *upper part* of the *Lain Farm*; which provides, that if either of the devisees of that part should *marry*, they should have paid *by the other two* 10*l.* a-year *during his life*; contending, that the words, "*to have paid them by the others*," used in the clause respecting the *upper part* of the *Lain Farm*, and omitted in the

devise in question, *must be supplied in that devise*; as there could be no plausible reason assigned for supposing that the testator meant to make a different disposition of one part of the same farm to certain of his grand-children, from that which he had made of another part of the same farm to others of his grand-children; insisting on a maxim, well known as applicable to the moral character of man, "*noscitur a sociis*," as a rule to be adopted in the interpretation of wills. That the exposition of every will must be founded on the whole instrument, and be made *ex antecedentibus et consequentibus* is one of the most prominent canons of testamentary construction; yet where between the parts there is no connexion by grammatical construction, or by some reference express or implied; and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts; though he may have varied his phrase, or expressed himself imperfectly; the Court cannot go into one part of a will to determine the meaning of another, *perfect in itself*, and *without ambiguity*, and not militating with any other provision respecting the same subject-matter; notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction. If a man should devise generally his lands, after payment of his debts and legacies, his trust (a) estates would not pass: for in such case "*noscitur a sociis*" what the land is which the testator intended to pass by such devise; it is clear he could only mean lands, which he could subject to the payment of his debts and legacies. But from a testator having given persons in a certain degree of relationship to him a fee simple in a certain farm, no conclusion, which can be relied on, can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm. Where the words of the two devises are different, the more natural conclusion is, that as his expressions are varied, they were altered because his intention on both cases was not the same. (His Lordship here referred to what Lord C. J. *Wilmot* says on this subject in his Reports p. 233.) And, if it be necessary to cite them, there are not wanting authorities to shew, where clauses in a will are independent, that the one shall not govern the other, in cases where it is full as probable, as in this case, that the same interest was intended in both. If a devise be in these words, "I devise *Black-acre* to J. S." Item, "I devise *White-acre* to J. S. and his heirs:" per *Coke*, C. J. this is only an estate for life in *Black-acre*; for the item has no dependence on the first clause, but is distinct and several. 1 Rol. Rep. 369. pl. 23. So, where a man devised "to his son *Henry* and his heirs the house in which he dwelt. Item to his son *Henry* his house in J. Item to his son *Henry* his houses in the tenure of J. S. Item *his pastures called Southfields*. Item all bargains, grants, and covenants, which he had from *Nicholas Webb*, his son *Henry* should enjoy and *his heirs for ever*, and for *lack of heirs of his body to remain to his son Francis for ever*." It was held that *Henry* took only an estate for life in the *Southfields*; and that the words were too ambiguous to disinherit an heir at law. *Spirit v. Bunce*, Cro. Car. 368. In the case of *Cunden v. Clerke*, Hob. 33. Lord *Hobart* says, "what warrant is there, when the devisor speaks sensibly and certainly, to enlarge his gift, for ought appeareth, "*beyond his meaning*; which is as great an injury as to *abridge his meaning*." In the late case of *Doe ex dem. Child v. Wright*, 8 Term Rep. 64. 1 New Rep. 735, and 7 East, 259, the devise was in these words "I devise to my "*grandson James Wright* all my lands, freehold, copyhold, and leasehold, in "the county of *Essex*. Also I devise to *James Wright* all my estate, freehold "and copyhold, at *Ellington*, in the county of *Huntingdon*. Also I give to "my *grandson John Wright* all my estate lands, &c. known by the name of "the *Coal-yard*, in *St. Giles's*. Also I give to my *grandson James Cam-*

(a) *Roe v. Read*, 8 Term Rep. 118.

“ per (who was his heir at law) the house I now live in, and all my houses “ known by the name of the *Castleyard* in *Holburn*, in the tenure of *G. O.*” This Court, and afterwards in the Court of Common Pleas three of the Judges were of opinion, that this devise gave only a life-estate to *James Wright* in the lands in *Essex*; notwithstanding the other devise, which gave him a fee in the lands in *Huntingdon*; and notwithstanding *John Wright* had a fee in the lands given him: and notwithstanding *James Camper*, the heir at law, would take a fee in what was devised to him. And in that case, as in this, the argument was pressed, that it could not but be supposed that the testator meant to give the same interest in the different estates devised to his three grandsons. The reasoning in those cases applies to that now under our consideration. The clauses here are distinct and independent: there are no words of reference to connect them; and, without connecting them, no such clear, unambiguous intention can be collected from implication, as is necessary to disinherit the heir at law. For the testator might mean, that the 10*l.* a-year should be a charge on the lands in the hands of his heir, in case of his grand children marrying: and if the words be not sufficient to create such charge in the hands of the heir, they will not be sufficient of themselves to give over the estate, and create such charge upon it in the hands of another. And if, according to *Mr. Dampier’s* argument, on the marriage of the several devisees, their shares should be held to go over in fee to those who should remain single, and in no event to the heir at law; that devisee who remained longest single, though he should ultimately marry, would take a fee in the shares of all the others, notwithstanding his having done that which determined the estates of his brother and sisters: which the testator hardly could have intended. And though there may be reasons for thinking it improbable that he meant to charge his personalty with these sums; yet it has not been denied, but that the words are sufficient to charge the personalty, if there be no other funds on which these annual sums can be thrown. But if that be not so, it is impossible that a person, so ill advised as this testator appears to have been, may not have had any distinct fund or person in his contemplation, on whom he meant to lay the charge; and it is only from the Court’s seeing it was his intent to charge those devisees who should remain single, that it could say, that it was the intent of the testator that the plaintiff should take the shares of those who should marry. Another argument for the construction insisted on for the plaintiff has been taken from the charge of 5*l.* per ann. in favour of the testator’s son’s wife, if she should outlive him. But it must be observed, that here is no *personal* charge on the devisees, nor a charge on the *estates given to them*, which might furnish an inference that the intent of the testator was, that the unmarried devisees should take the shares of those who might marry, from the improbability of his meaning being, that a burthen should be thrown on those who might remain single, by the conduct of the others in marrying. But the charge is simply a charge of 5*l.* a-year on *each of the farms*; a charge which will of course affect each of the farms into whosever hands they may go. Had the words used by the testator permitted us to construe the devise in question as creating a joint-tenancy, it is possible that, by so doing, his intent, as contended for, might have been effectuated: but after the several determinations (vide *Denn v. Gaskins*, Cowp. 660.) as to the effect in devises of the words “*equally to be divided*,” and of the word “*equally*,” without any thing to controul their meaning; it is impossible to say, (and so it was admitted at the bar,) that the devise in question does not make a tenancy in common. And, after full consideration, we are of opinion that *John Allen Compton*, the lessor of the plaintiff, took no estate in the 3-4ths of the *lower part* of the *Lain farm*; and that the *postea* must be delivered to the defendant.

Townsend, Clerk, v. Wathen.

9 East, 277. Jan. 26, 1808.

If a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbour's premises, must probably be attracted by their instinct into the traps; and in consequence of such act his neighbour's dogs be so attracted, and thereby injured, an action on the case lies.

THE plaintiff declared, in case, and stated that on the 1st of *April* 1800, and on divers other days, &c. the defendant, wrongfully intending to catch, maim, and destroy the plaintiff's dogs at *B.* &c. placed and procured to be placed divers traps, &c. in and about a certain wood called *Cattenwood*, there situate, and near to divers public highways and footways, and also near to divers grounds of the plaintiff, and of other persons there situate, and procured to be placed pieces of flesh and other strong smelling things in and about the said traps, &c. and continued the said traps and pieces of flesh, &c. for a long time, &c.; and continued the same there in the day time, &c. and also on the several days and times procured to be trailed pieces of flesh and other strong smelling things along the ground about the said traps, &c. so laid as aforesaid, and from the said highways, footways, and grounds, towards and into the said traps, &c. By reason of which premises on the several days, &c. at *B.* aforesaid, divers dogs of the plaintiff, then and there lawfully going along the said public ways, &c. and others of the plaintiff's dogs, then and there lawfully being in his said grounds, and others of them in the said grounds of other persons, were by the scent of the said flesh and other things so placed and trailed, enticed from the said highways, footways, and grounds respectively, to the said traps, &c. and were caught therein, and greatly wounded, &c.

After a verdict for the plaintiff at the trial at *Gloucester* before *Macdonald*, C. B. it was objected by *Williams*, Serjt. on a motion for a new trial, that there was no evidence of any malicious intention against the plaintiff's dogs, or that the traps were set for the purpose of catching dogs in general; and that this was necessary to sustain the action; the traps having been set in the defendant's own ground, on which the plaintiff's dogs must have been trespassing at the time they were taken; and the defendant having a right to set the traps there. And a rule *nisi* was granted for setting aside the verdict as against evidence: but the Court refused another rule which was also prayed, for arresting the judgment: Lord *Ellenborough*, C. J. saying, that the count having charged that the traps were wrongfully set for the purpose of catching the plaintiff's dogs, though set in the defendant's own ground, no doubt that the action was maintainable.

Upon reading the Chief Baron's report of the evidence in this term, it appeared, that the plaintiff and defendant lived near each other in the country. The defendant was the owner of a wood called *Cattenwood*, about a mile in length, one end of which adjoined the plaintiff's grounds, within 150 yards of his dwelling-house where he had resided for about two years last past. Some time before the plaintiff went to reside there, the defendant had procured half a dozen traps to be made much larger and stronger than those usually set for catching vermin, which he stated at the time to be intended for foxes, or any thing that came in the way; and in fact a sheep had been caught in one, and a deer of the defendant's own in another of them. Some of these traps were set in *Cattenwood* by day and by night, and baited sometimes with fresh, and sometimes with stinking flesh. The wood was intersected by several public highways and paths: but the traps were so set near blind tracks in the wood made by persons or by sheep. The defendant's game-

keeper also trailed sheeps' paunches, rubbed with annis seed, by a string, at some distance round about the traps, (but this did not appear to have been done from the highways, or after the plaintiff came to reside at his house,) in order to draw animals to them; and the defendant allowed 2s. 6d. for every fox or badger, and 1s. for every dog which was killed. In one year, seven dogs had been taken and killed, which the defendant was proved to have known and approved of. *Cotteswood* was not a preserve for game; nor did the whole of it belong to the defendant; nor was any board put up there to warn persons of the traps: and the witnesses stated their opinion, that the traps could not safely be so baited and scented in the day time when dogs were commonly passing with their owners through the wood; and that a dog, on account of the scent, could not pass along the public paths without danger of being drawn by his instinct to the traps. All this, which had passed before the plaintiff came to reside at his house, was continued afterwards; and at different times within the last two years several of his dogs had been caught in the traps which were baited with flesh; by which some of them had been much injured and others entirely spoiled: and some of the traps were set in the wood so near to the plaintiff's house, that the baiting and the annis seed might be scented by his dogs which were kept there.

Dauncey and *Abbott* were heard very shortly in support of the verdict; the Court being desirous of hearing the grounds of objection against it.

The Attorney-General, Garrow, (and C. F. Williams,) in support of the rule, after observing that the time of the trailing round the traps was not distinctly marked in the report: and that in fact it had happened a long time before the plaintiff's dogs were caught (which were not denied;) and there was no evidence that the traps were purposely set to catch the plaintiff's dogs; contended the defendant had a right to set the traps in his own ground, and to bait them, for the purpose of catching vermin; and that he was not answerable if the dogs of other persons unlawfully trespassing on his grounds were caught in the traps. The owners of dogs had only a right that the dogs should pass along the highways, with some person to attend them and restrain them, if such was their instinct, from hunting the woods in quest of game. If indeed the defendant had placed the traps so near any of the public paths that a dog going along there with his master must, notwithstanding reasonable care of the master, in all probability be drawn into them, the defendant would be liable; and so he would, if he used means for the purpose of decoying them to the trap: but here the traps were set for the lawful purpose of catching vermin in the defendant's own ground; and if the owner of a dog likely to traverse a wood in quest of game will carry him, or suffer him to trespass, there, without restraint, he must take the consequences.

Lord ELLENBOROUGH, C. J. It appears by the evidence reported, that the traps were placed so near to the plaintiff's court yard where his dogs were kept, that they might scent the bait, without committing any trespass on the defendant's wood. Every man must be taken to contemplate the probable consequences of the act he does. And therefore when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals, and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. That which might be taken as general evidence of malice against all dogs, coming accidentally within the sphere of the attraction which he had placed there, must surely be evidence of it against those in particular which were placed nearest to the source of attraction, and within the constant influence of it. What difference is there in reason between drawing the animal into the trap by means of his instinct

which he cannot resist, and putting him there by manual force? If a man knowingly keep a dog accustomed to bite, and any person coming by chance in his way be bitten, an action lies against the owner, though he had no malice against the particular individual. Here there is evidence that the defendant's purpose in setting the traps was to catch dogs in general, as well as vermin; for he afterwards recompensed his servant for dogs taken in the traps. The rule, therefore, *omnis ratihabitio retro trahitur et mandato equiparatur*, applies to this case. Without, therefore, considering what had happened before the plaintiff came to his residence in the defendant's neighborhood; when he did come, he came to a place where the mischief existed, and continued to operate within the sphere where he might lawfully have his dogs, and which, in fact, did afterwards operate upon them to the plaintiff's prejudice.

GROSE, J. I think there is evidence that the defendant meant to set the traps for dogs as well as other animals: because when dogs were caught in them, he rewarded his game-keeper at the rate of so much a head. This therefore was fit evidence to be left to the jury of his intention to catch the plaintiff's dogs as well as others. It is true, that the traps were set in his own ground; but a man must not set traps of this dangerous description in a situation to invite his neighbour's dogs, and as it were to compel them by their instinct to come into the traps.

LAWRENCE, J. There is no evidence of the defendant's having trailed round the traps while the plaintiff was residing at his house near the wood; but there is evidence of the traps having been baited after he came to reside there: and this, so near to the plaintiff's house as to draw his dogs to them by their scent. The very object of baiting traps is to draw animals towards them by their instinct from the course they are pursuing; when therefore the defendant placed his traps so baited in a situation so near to the plaintiff's house, as that his dogs kept there might scent the bait, he must be taken to have contemplated the natural consequence. He did, therefore, in the words of the declaration, entice the plaintiff's dogs, &c.

LE BLANC, J. The only question now is, whether the evidence sustains the verdict. If a man will put traps baited in places so near the highway as that dogs passing along there will probably be attracted by the scent into the traps; that is evidence that he does the act for the purpose of catching any dogs that may happen to pass along there. When the evidence is, that before the plaintiff came to reside at his house, the defendant's gamekeeper used to trail meat rubbed with annis seed round about the traps; it is plain, that the intent was to attract all animals whose instinct was governed by the scent into the traps. Then, after the plaintiff came to reside at his house, the placing these baited traps so near to the plaintiff's premises where he kept his dogs as to attract them by the scent, must be evidence to go to the jury, that the traps were placed there for that purpose.

Rule discharged.

Barker v. Blakes.

9 East, 288. Feb. 1, 1808.

1. It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of an hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country, though the neutral thereby subject his ship to be detained and carried into a *British* port for the purpose of search. And therefore a *British* underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship whose voyage was so interrupted; either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time; or for an average loss, if such notice be given out of time.
2. Where a neutral ship from *America* to *Havre* was so detained and brought into a *British* port; and pending proceedings in the Admiralty the king declared *Havre* in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held a total loss of the voyage, which entitled the neutral assured to abandon. But,
3. The blockade of *Havre* having been publicly notified here on the 6th of *Sept.* and no notice of abandonment given till the 14th of *Oct.* nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any new authority shewn for giving it then; held that the notice was out of time: and this, though the plaintiff's agents in this country had no notice till the 17th of *October* of the decree for restoration of the ship and goods in question, which had been pronounced on the 8th of *October*.

THIS was an action on a policy of insurance on a quantity of oil by the ship *Hannah*, at and from *New-York* to *Havre de Grace*, dated the 4th of *August* 1803; which was tried before Lord *Ellenborough*, C. J. at the sittings at *Guildhall* after *Hilary* term 1807, when a verdict was found for the plaintiff for 45*l.* 2*s.* 8*d.*, subject to the opinion of this Court on the following case:

The insurance was effected on behalf of the plaintiff, an *American* citizen resident in *America*, and the proprietor of the oil. The defendant subscribed the policy for 100*l.* The oil was of greater value than the amount of all the insurances made upon it. The ship *Hannah* was an *American* ship, duly documented, and sailed from *New York* on the voyage insured on the 4th of *July* 1803, with the oil on board; and on the 17th of *August* following was arrested in latitude 49 degrees North, longitude 8 degrees West, (being in the course of the voyage,) by *The True Blues*, a *British* privateer, and sent into *Bristol*, where she arrived on the 30th of the same month. *Havre de Grace* is in latitude 49 degrees North, longitude six minutes East. On the 21st of *June* 1803, the following decree was issued by the *French* Government, "That from thenceforth there shall not be received into any of the ports of the *French* republic any colonial commodity coming from *English* colonies, nor any goods coming directly or indirectly from *England*." "Consequently, all goods and merchandize of *English* manufacture, or coming from *English* colonies, shall be confiscated." On the 6th of *Sept.* 1803, the *British* Government declared the port of *Havre* to be in a state of blockade; and such blockade has continued ever since. The ship and cargo were libelled in the Court of Admiralty by the captors: and on the 8th of *October* following the ship and the oil in question, and the rest of the cargo, were, by a sentence of that Court, ordered to be restored to the use of the owners; subject to the payment of freight and expenses, but without costs or damages; except one box of books, which was condemned as *French* property; and 53 hogsheads of bark, and 3646 pounds of whalebone, which were then reserved for further proof, and were afterwards condemned as lawful prize by the following sentence. "*Hannah*, *Augustus Ryan*, 9th *Nov.* 1804. No further proof having been exhibited of the property of 53 hogsheads of bark, and 3646 lb. of whalebone; and the Judge, at the petition of *Bog*, on motion of counsel, by interlocutory decree, condemned the said goods as good and lawful prize to *Edward Vincent Paul*, commander of the private ship of war

"*True Blue*, in sight of his majesty's ship of war *Phoenix*, *Wm. Baker*, Esq. "commander." On the 14th of *October* 1803, the plaintiff's agents in this country, who had effected the policy, abandoned the oil in question to the defendant and the other underwriters, in proportion to their respective interests. The agents of the plaintiff were apprised of the detention of the vessel, and of the suit in the Court of Admiralty, soon after they respectively took place; but were not parties to the suit, and did not know of the restoration of the vessel and cargo until the 17th of *October*, three days after the abandonment. The plaintiff's agents afterwards applied to the captain of the ship *Hannah* to reload the oil and convey it to *Havre*, which he positively refused to do, and declared that he should sail directly to *New York*. The ship *Hannah* cleared out at *Bristol* on the 20th of *December* 1803 for *New York*, and in *January* 1804 sailed for that place, leaving the oil in question at *Bristol*. The oil was afterwards sold in this country by agreement, without prejudice to the question between the assured and underwriters, to the best possible advantage: and the loss amounted in the whole to 45*l.* 2*s.* 8*d.* per cent., of which the freight and expences of restoration, paid under the sentence of the Court of Admiralty, amounted to 20*l.* 19*s.*; that is, the freight alone to 12 per cent., the expences to 8*l.* 19*s.* per cent. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover the whole, or any and which of the said sums? If the Court should be of opinion that he was entitled to recover any thing, the verdict was to be entered accordingly: otherwise a nonsuit was to be entered. The case was argued in last *Michaelmas* term, when

Abbott for the plaintiff contended, first, that the insurance was lawful at the time it was made, being upon a neutral ship, for a voyage from the neutral's country to a port in *France*, which it was lawful for the neutral to make, though *France* was at enmity with us: and such a voyage was not in contravention of any law of this country. 2dly, That the loss of the voyage, which entitled the assured to abandon, was derived from the original act of detention, without which the ship and cargo would not have come within the prohibition of the *French* decree of the 28th of *June* 1803; nor would the blockade of *Havre* by the *British* Government on the 6th of *September* have operated upon the voyage insured. Then, even admitting that it was lawful for a *British* ship to bring the *American* into a *British* port in order to search for enemy's goods, yet it was not unlawful for a *British* underwriter to insure the neutral against the loss and expences consequent on such injurious detention, after the ship and the goods in question were restored by the sentence of the Court of Admiralty. The neutral owner is in no fault because his goods are embarked in a ship in which enemy's goods are also loaded. If there had been *English* goods on board the same ship, and a *French* cruiser had stopped the *American* and taken her into another port where the *English* goods were seized and condemned, and the others liberated, it cannot be disputed but that the underwriters would have been liable to indemnify the expences incurred by the neutral. The cases of *Furtado v. Rodgers*, 3 Bos. & Pull. 191. *Kellner v. Le Mesurier*, 4 East, 396, and *Gamba v. Le Mesurier*, Ib. 407, which were insurances of enemies' property do not apply: and in *Lubbock v. Potts*, 7 East, 451, the Court seemed to think that an insurance against *British* capture, seizure, and detention, generally, must be construed as extending only to cover unlawful capture, &c.; or that even extending it to temporary lawful detention, without any fault of the assured, it would be good. 2dly, He contended that the abandonment was in time. The ship and cargo were not ordered to be restored till the 8th of *October*, and on the 14th the plaintiff's agents abandoned the goods insured to the underwriters, three days before they knew of the decree for restoration. That the voyage was lost is clear: and unless it were necessary for the assured to abandon immediately after notice of the detention, or of the blockade of *Havre* by our government

on the 6th of *September*, there seems no reason why the election should not be open to his agents while they still remained ignorant of the event.

Scarlett, contra, contended first, that at any rate the plaintiff could only recover for a partial and not for a total loss: the abandonment being out of time. The principle to be collected from all the cases is, that where the voyage is lost, but the property is saved, the owner must abandon, if at all, in the first instance; and cannot wait to see whether he can prosecute the voyage to advantage, and afterwards elect to abandon when he finds he cannot. And therefore in *Anderson v. The Royal Exchange Company*, 1b. 38, where notice of abandonment was not given till 18 days after notice of the loss by the agent of the assured, it was held too late. Now here the vessel was detained on the 17th of *August*; and taking that to have put an end to the voyage, and to have entitled the plaintiff's agents to abandon, they did not abandon till nearly two months after. But if the blockade of *Havre* on the 6th of *September* be the event to be looked to as putting an end to the voyage; that was an act of our own Government, against which the underwriters cannot be taken to have insured, according to *Hadkinson v. Robinson*, 3 Bos. & Pull. 388. Neither can the *French* decree of the 21st of *June* 1803 be considered as a peril insured against. The question must therefore rest on the ground of the original detention; and if that put an end to the voyage, the assured should, without waiting for events, have given immediate notice of abandonment. At any rate, if the blockade by our government on the 6th of *September* be considered as a new contingency which defeated the voyage, on which a new right of abandonment attached, notice of abandonment should have been given immediately afterwards: and it came too late after the decree for restoration of the goods on the 8th of *October*. But 2dly, The loss did not happen from any risk within the policy. The detainer of the ship was clearly lawful, and some of the goods found on board were actually condemned as prize: and the policy does not extend to indemnify the assured against the consequences of a legal detention by a *British* captor. The law knows no distinction in this respect between the owner of the ship and the owner of goods on board it. The latter must take the fate of the ship owner with respect to insurance. If a ship be not sea-worthy, or be warranted neutral and do any act to break its neutrality; though the owner of goods on board have no controul over the acts of the ship, and be in no fault, his insurance is equally avoided. *Furtado v. Rogers*, 3 Bos. & Pull. 191, was the case of an insurance from *Bayonne* to *Martinique* and back again, made during peace; and on the breaking out of the war with *France* afterwards, the ship was captured at *Martinique*: but the ground of the decision there was, that where a *British* subject insures against capture generally, there is an implied exception of capture by the authority of our own government, though subsequently given. *Kellner v. Le Mesurier*, 4 East, 396, followed upon the same ground. The capture of any neutral can only be justified by the subsequent condemnation; and the captor acts at the peril of disproving the neutrality, or shewing some just ground whereby the privilege is forfeited by an act done in prejudice of the belligerent. If a neutral ship act in aid of the enemy by protecting his goods, and it be lawful for a *British* ship to seize the neutral and bring her into port for the purpose of search, and the event justify the seizure; it is as much against public policy to suffer a *British* subject to insure against such seizure and the necessary consequences of it, as to insure against the capture of an enemy's ship. This question did not occur in *Lubbock v. Potts*, 7 East, 451, and what fell from the Court incidentally in the course of the argument must be taken with reference to the case in judgment, which was that of a *British* ship insured against *British* detention, &c. by which the Court seemed inclined to understand illegal detention; or at least legal detention, which was only temporary, but which might occasion the loss of the market.

Abbott in reply. As to the question of timely abandonment; there is no

precise period for it; the law only requires it should be made within a reasonable time. Now till the 6th of *September*, when *Havre* was declared to be blockaded, the assured might have intended to pursue the voyage when the ship and cargo were liberated: but the blockade was a new and unforeseen occurrence arising out of the detention of the ship; and the question is whether it were unreasonable to wait after that till the 14th of *October* before the notice to abandon was given: for as to the French decree, it was then doubtful whether it would be deemed to apply to a neutral who was forced into an enemy's port. As to the last and principal point, *Kellner v. Le Mesurier* was certainly decided on the ground of its being enemy's property; for the plaintiff declared on a loss by capture as *prize by the King*; and this was relied on in the judgment there given. 4 East, 402. And all the cases where the objection has been sustained in the case of a neutral were founded upon unlawful acts done by the neutral; which distinguishes those cases from the present. Suppose the enemy was blockading a port of this kingdom, and a neutral in attempting to force the blockade was taken; though the loss would be by his own act, yet a *British* underwriter would be liable. If the objection were to prevail on the general ground in this case, it would in effect be declaring, that any insurance of neutral goods from a neutral to an enemy's country, though in a neutral ship, was illegal.

The Court, from the extensive consequences involved in the determination of the general question, wished to have had the case argued again; but understanding that the value of the property was inconsiderable, and that the parties were disinclined to incur any further expence, they said they would consider of it, and give their opinion another time. And now,

LORD ELLENBOROUGH, C. J. delivered judgment.

This was an action on a policy of insurance, dated the 4th of *August* 1803, on a quantity of oil belonging to an *American* proprietor, shipped on board an *American* ship, the *Hannah*, on a voyage at and from *New York* to *Havre de Grace*. [After stating the case, his Lordship proceeded.]

The whole amount of loss claimed on the part of the plaintiff is 45*l.* 2*s.* 8*d.*, consisting of 20*l.* 19*s.*, the freight and expences paid under the sentence of the Court of Admiralty, and 24*l.* 3*s.* 8*d.* the difference, I presume, between the invoice value of the oil in *America*, and the proceeds of the sale here. The defendant contends, that the plaintiff is at any rate not entitled to recover the latter item of loss; his claim thereto being merely founded on an abandonment which was not made, as the defendant insists, in due time. But he further contends, that the plaintiff cannot by law recover at all, even to the extent of the average loss of his freight and expences, under this policy; and that to allow of such a recovery would be to allow of an indemnity being afforded, through the medium of *British* insurance, to neutrals, acting in contravention of the interests and policy of *Great Britain*, in the carrying of the goods of its enemies. That in so doing the neutral had, in effect, violated the duties of his neutrality, and assumed a hostile character in respect to this country. But it does not appear to us, that this general objection to the plaintiff's right to recover is well founded. The *American* was at liberty to pursue his commerce with *France*, and to be the carrier of goods for *French* subjects; at the risk, indeed, of having his voyage interrupted by the goods being seized: or of the vessel itself, on board of which they were, being detained or brought into *British* ports, for the purpose of search: but the mere act of carrying such enemies' goods on board his vessel constituted no violation of neutrality on the part of the *American*; nor did the arrest and detention of his vessel, for the purpose of search and eventual condemnation of the goods which might be found on board belonging to the enemy, form any breach of our duty towards the *American*. The indemnity sought under the policy in this case is not an indemnity to an enemy, or to a neutral forfeiting his neutrality by an act hostilely done by him against the interests of *Great*

Britain; but an indemnity to a neutral, as such, against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights; and as innocently and allowably to a certain degree controuled and interrupted on our part, in the exercise of our rights, as belligerents, against enemies' property found on board the ship of a neutral. These rights, though they are in a degree adverse to each other, do not, therefore, in the exercise of them, necessarily place either party in the situation of an enemy to the other. The various competitions for commercial advantage and superiority, which take place between different nations; their mutual exclusions of each other by their respective municipal regulations; are so many acts of adverse policy and conflicting rights, exercised towards each other; but they occur without producing any breach of national amity. And it has never yet, in any instance, that I am aware of, been held a breach of implied duty in the subjects of either state to lend their assistance by insurance or otherwise to such rival or exclusive commerce or interests of the other. Cases of express public prohibition, and that degree of assistance to enemies which constitutes a society in war against any particular state, fall of course under a different consideration, and are necessarily to be understood as interdicted subjects of insurance in every country to which this species of contract is known.

The voyage and commerce, therefore, in the course of which the vessel carrying the goods insured was in this case engaged, not being either of a hostile description, nor in any other way expressly or impliedly forbidden by the law or policy of this country, the general objection to the plaintiff's recovering at all under this policy of insurance falls to the ground(1). Which brings the case under our consideration to this point, Whether the plaintiff be entitled, under the circumstances, to recover as for a total loss, or for the freight and expenses adjudged by the Court of Admiralty to be paid, as an average loss only.

In order to entitle himself to recover as for a total loss, the plaintiff must establish two things: First, that a *loss of the voyage* (the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored, and are capable of being so,) *was occasioned by the detention in question*, which continued until and after the blockade took place, which rendered the prosecution of the voyage to *Havre* no longer practicable: and, secondly, (supposing a loss so occasioned to be a total loss, "by detention," within the policy;) that the *abandonment* of the goods was made *in due time*. And thinking, as we do, that the impossibility of prosecuting the voyage to the place of destination; which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of such voyage(2); provided such loss had been followed by a sufficiently prompt and immediate notice of abandonment. We are of opinion, however, upon the authority of the cases adverted to in the argument, that this abandonment which was made on the 14th of Oct. 1803,

(1) Vide *Muller v. Thompson*, 2 Campb. 610.

(2) That an actual blockade of the destined port is a sufficient ground of abandonment, see *Schmidt v. The United Insurance Company*, 1 Johns. 249. *Symonds v. The Union Insurance Company*, 4 Dall. 417. S. C. 2 Condly's Marsh. 564 a. acc. *Craig & al. v. The United Insurance Company*, 6 Johns. 226. *semb.* But a fear of capture is not. *Lubbock v. Rouverolt*, 5 Esp. 50. *Hadkinson v. Robinson*, 3 Bos. & Pull. 888. *Foster & al. v. Christie*, 11 East 305. *Blackenhagen v. The London Assurance Company*, 1 Campb. 454. *King v. Delaware Insurance Company*, 1 Condly's Marsh. 81. b. *Richardson & al. v. Marine Insurance Company*, 6 Mass. Rep. 102. *Cook v. Essex Insurance Company*, Id. 122. *Amory & al. v. Jones*, Id. 318. *Let v. Gray*, 7 Mass. Rep. 349. *Craig v. The United Insurance Company*, 6 Johns. 226.

*[See also *Ogden v. N. Y. Firemen Insurance Company*, 10 Johns. 177. S. C. in error 12 do. 25.—W.]

above five weeks after the blockade of *Havre* had been publicly notified; the latest event to which the loss of voyage is capable of being referred; was not made within those reasonable and convenient limits of time which the law allows for this purpose. And it is to be observed, that no excuse for the lateness of the abandonment is offered on the score of any want of competent powers in the parties making the abandonment: as they do not appear to have been furnished with any other powers for this purpose at last, than what they must be supposed to have originally possessed, if they ever had any⁽¹⁾. The loss in question must, therefore, for want of a timely notice of abandonment, be regarded merely as an average loss: and the verdict must of course be restricted to the sum of 20*l.* 19*s.* the amount of the freight and expences to which the assured was subjected by the sentence of the Court of Admiralty. Judgment for that sum, and no more, must be given accordingly.

The King v. The Inhabitants of Ripon.

9 East, 295. Feb. 2, 1808.

An Indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law; and the master, though with her consent does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture.

THE sessions, on appeal, quashed an order of justices, for removing *Elinor Forton*, a pauper, from the township of *Ripon* in the *West Riding* of the county of *York*, to the parish of *Darlington* in the county of *Durham*; subject to the opinion of this Court on the following case:

The pauper *Elinor Forton*, being 23 years of age, was put apprentice by her father-in-law with her own consent, to one *Husbands* in *Hunton*. She was present at the making of the agreement; but the indenture was only executed by the master and her father-in-law, but not by herself; neither was it ever tendered to her for that purpose, though she lived under it with her master for nearly 12 months in *Hunton*. The Sessions were of opinion that she gained a settlement in *Hunton*. But when the case was called on

The Court asked whether it were possible to maintain this to be a competent binding of an adult who was no party to the indenture? The relation of master and apprentice did not exist.

(1) That where there is a *technical*, but not an actual total loss, the assured must give notice of abandonment within a reasonable, and what shall be considered a reasonable time for this purpose, see *Mitchell & al. v. Etie*, 1 Term Rep 613, 4. 616. *Allwood v. Henkell*, Park, 172. Marsh. 593. *Anderson & al. v. The Royal Exchange Assurance Company*, 7 East, 38. *Kelly & al. v. Walton*, 2 Campb. 155. *Livermore v. The Newburyport Insurance Company*, 1 Mass. Rep. 264. *Livingston v. Hastie & al.* Opin. in Mayor's Court, N. Y. 77. *Bell v. Beveridge*, 4 Dall. 273. 1 Binn. 52 n. (a).

But where there is an *actual* total loss, no abandonment is necessary; or if made, it may be made and notice given at any time while the loss continues total. *Earl v. Shaw*, 1 Johns. Ca. 313. 317. *Rogel v. Thurston*, 2 Johns. Ca. 249. *Bordes v. Hullett*, 1 Caines 449, 450. *Lawrence v. Sebar*, 2 Caines 208. *Steinbach v. The Columbian Insurance Company*, 2 Caines 132, affirmed in the Court of Errors, 2 Caines' Ca. in err. 161, 174. *Tom v. Smith*, 3 Caines 250. *Suydam & al. v. The Marine Insurance Company*, 1 Johns. 191. *Gracie v. The New York Insurance Company*, 3 Johns. 246. *Bohlen v. The Delaware Insurance Company*, 4 Binn. 420. *Brown v. The Phoenix Insurance Company*, 4 Binn. 445.*

*[Under ordinary circumstances, a vessel cannot be abandoned as for a constructive or technical total loss, on the ground of the inability of the master to obtain funds, to make necessary repairs, where the owner is chargeable with want of ordinary prudence in furnishing funds, or credit, and especially where he has deprived the master of the means ordinarily possessed by him to obtain funds or credit. *Amer. Ins. Co. v. Ogden*, 29 Wend. 287.—W.]

Park and *Hullock*, who where to have argued in support of the order of sessions, admitted that they could not support it.

Dampier and *Scarlet* contra.

Order of sessions quashed.

Robinson qui tam v. Garthwaite.

9 East, 296. Feb. 1, 1808.

A captain in the militia receiving his pay and contingent allowances, before his qualification was properly authenticated, is not *executing any power* directed by the militia act of the 42 G. 3 c. 90 to be executed by captains, so as to bring him within the penalty of the 14th clause; the receipt of such pay and allowances not being provided for by that statute, even if any other than acts of military discipline were intended to be so prohibited. Though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened within the proper county where the venue is laid.

IN debt for penalties of 100*l.* alleged to have been incurred by the defendant under the militia act of the 42 Geo. 3. c. 90. s. 14, the 4th count of the declaration, on which the plaintiff took a verdict, stated that the defendant, a captain in the 2d royal *Surrey* regiment of militia, executed certain powers directed by the statute to be executed by captains, viz. by *acting as a captain* in the said militia, without having delivered in such specific description of his qualification as is required by the statute, whereby, &c. The venue was laid in the county of the town of *Kingston* upon *Hull*. and the cause was tried at *York* before *Chambre, J.* when it appeared that the defendant was duly qualified to hold his commission as a younger son of a person seised of an estate of above 600*l.* a-year, but in the first description of his qualification sent in to the clerk of the peace, as required by s. 6. and 12, of the act, there was a defect in omitting to state the parishes wherein the estate was situated, which was afterwards rectified by sending in a proper description of them. The plaintiff however proved, that prior to the mistake being rectified, the defendant had acted as captain upon the parade, and at the guard-house, and had also sat as president of a court martial: but it appearing afterwards that these acts were all done in the county of *York* where the trial was had under the stat. 38 Geo. 3. c. 52. and not within the county of *Hull* where the venue was laid, the learned Judge held that they could not be received in evidence; for though as to the latter instance, the sentence of the court martial was afterwards read and executed at the citadel in *Hull*, yet the defendant was not proved to have been present there upon the occasion. The only act proved to have been done by the defendant in *Hull* previous to the completion of his qualification, and which was contended to be the execution of a power directed by the statute (a), to be executed by captains, was the receipt of his pay and contingent allowances, as captain, at a banking house in *Hull*. And on this a verdict was taken for the plaintiff on the 4th count, with liberty to the defendant to move to enter a nonsuit.

Park, in the last term, moved for a rule for entering a nonsuit, on the ground that the receipts of the defendant's pay and contingent allowances was not the execution of any *power* directed by the statute, as no provision was therein made for any such payment; even if the act of receiving money could be considered as the exercise of a *power*. He also moved in arrest of judgment, because it was not stated in the declaration in what way the defend-

(a) Sect. 14. enacts, "That if any person shall execute any of the powers hereby directed to be executed by captains, not being qualified as aforesaid, or without having delivered in such specific description of his qualification as before required, &c. he shall forfeit 100*l.*" &c.

ant had *acted as captain*; so that he had no notice what he was to answer; and this too in a penal action. A rule *nisi* was granted on both points; which came on now to be discussed; when, after hearing *Topping* and *Richardson*, who shewed cause against the rule,

The Court(a) were clearly of opinion that the rule for entering a nonsuit should be made absolute. This being a penal action, the clause giving the penalty ought not to be extended by construction beyond the plain words of it which confined the offence to the executing any of the powers directed by the act, without the qualification required. The receipt of the pay and contingent allowances of a captain was admitted not to be provided for by the act in question; and therefore, at any rate, such receipt was no execution of any power directed by the act to be executed by captains; even if any thing more were intended by that clause than to subject unqualified officers to the penalty if they executed any act of military discipline; which Lord *Ellenborough* inclined to question.

Rule absolute for
entering a nonsuit.

Phillips v. Bacon.

9 East, 299. Feb. 3, 1808.

In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods under a writ of *feri facias*, by which they were sold much under value, where, in stating the substance of the writ, the count alleged that the sheriff was commanded to levy 80s. awarded to *J. C.* for his *damages* sustained by occasion of the detaining the debt, that in proof by the writ which stated that the 80s. were awarded to *J. C.* for his *damages* sustained as well by reason of detaining the debt as for his costs, &c. for costs are in legal sense included in the word *damages*.

THE first count of the declaration stated, that on the 25th of April 1806, a *non omittas feri facias* writ issued out of *B. R.* directed to the sheriff of *Glamorgan*, by which writ the king commanded the said sheriff that of the goods and chattels of the plaintiff in his bailiwick he should cause to be levied as well a certain debt of 264*l.* which *J. Cameron* in the said court had lately recovered against him, as also 80s. which were awarded to the said *J. C.* for his *damages* which he had sustained by occasion of the detaining the said debt, whereof the plaintiff was convicted; and that the sheriff should have that money before the king's justices, &c. on a certain day therein mentioned, and long since passed, to render to the said *J. C.* for his debt and damages, and should have there then that writ: which writ afterwards, and before the return thereof, to wit, on the 29th of April 1806, was delivered to the defendant, who then and until after the return thereof was sheriff of *Glamorgan*, to be executed in due form of law; by virtue of which writ the defendant, as such sheriff, before the return, seized and took into his possession divers cattle, goods, and chattels of the plaintiff, of the value of 1200*l.*, and proceeded to the sale thereof, and sold the same under and by colour and pretence of the said writ for prices amounting in the whole to a small sum, to wit, 200*l.* And the defendant, not regarding his duty in that behalf, as such sheriff, but wrongfully intending to injure and prejudice the plaintiff in this respect, wrongfully and injuriously conducted himself so negligently, deceitfully, fraudulently, and improperly in the same proceeding to the sale of and selling the said cattle, goods, and chattels, upon that occasion, that by reason of such his neglect, deceitful, fraudulent, and improper conduct, the same were sold for much less than the real value thereof, and than the same might and ought to have been sold for by him, had he conducted himself with due care and diligence, and

(a) *Lawrence, J.* was absent on this day, assisting the Lord Chancellor on the hearing of a cause in the Court of Chancery.

uprightly and properly in that behalf, viz. at prices amounting in the whole to 1000*l.* less than the real value, or less than they might or ought to have been sold for. There were other special counts to the like effect: and there was a fifth count, in trover, for so many horses, &c. and pipes of wine. Plea not guilty.

The case was tried before *Macdonald*, C. B. at *Hereford*; and by the words of the writ when produced the sheriff was commanded to cause to be levied of the plaintiff's goods, &c. "as well a certain debt of 254*l.* which *J. C.* in the said Court had recovered against him; as also 80*s.* which in our "same Court were awarded to the said *J. C.* for his damages which he had "sustained *as well* by reason of detaining the said debt, as for his *costs* and "charges by him about his suit in that behalf expended, whereof the said *R. M. P.* (the plaintiff) is convicted," &c. In the result, the case did not go to the jury on the count in trover, but only on the special count; between which and the writ it was objected that there was a material variance; the writ declared on stating the 80*s.* to be awarded to *J. C.* "for his *damages* sustained by occasion of the detaining the said debt:" the writ proved stating the 80*s.* to be awarded "for his *damages as well* by reason of detaining the said debt, as for his *costs* and charges, &c." The Chief Baron reserved the question, but let the case go to the jury, who found a verdict for the plaintiff for 600*l.* damages; and the defendant had leave to move to set aside the verdict and enter a nonsuit; for which he obtained a rule nisi in the last term.

Dauncey, Bevan, Clifford, Abbott, and Peake, now shewed cause against the rule. The very words of the writ, which was only inducement to the action, and not the gist of it, need not and are not affected to be stated in the count, but it was sufficient to state the substance and legal effect of it. (a) This differs the case from *Baynes v. Forrest*, 2 Stra. 892, *Coy v. Hymas*, 2 Stra. 1171. and *Barnes v. Constantine*, Yelv. 46, and other cases where the record declared on was the gist of the action; and also from *Bristow v. Wright*, Dougl. 665, and other cases of declarations on contracts, for the like reason. The *costs* are a part of the *damages* sustained by the detention of the debt, and the word *damages* is sufficiently large to comprehend *costs*. This appears from the old entries. *Cliff's Entr.* 860. pl. 43. *Rast. Entr.* 194. pl. 4. *Co. Entr.* 147. 150, 151, 2. So in *Co. Lit.* 257. a. where *Littleton* mentions *damages*, Lord *Coke* says, that *costs* are included: and in 2 Inst. 288. he says, *costs* are in law so coupled together as they are accounted parcel of the damages. The very writ of *feri facias* in debt, 2 Imp. Pract. 465, 6, so considers them; for after commanding the sheriff to levy for the damages and costs, it directs him to have that money before the king at *Westminster* to render to the plaintiff for his debt and damages aforesaid. They also cited for the same purpose *Pilford's case*, 10 Co. 115. b., *Wentworth v. Squibb*, 1 Lutw. 640, *Ashmore v. Rypley*, Cro. Jac. 420, *Grenville v. Sandwich*, 7 Vin. Abr. 296. pl. 12. and 2 D'Anvers, 462, and *Witham v. Hill*, 2 Wils. 91.

There was another point made in argument, whether, supposing the variance to be fatal, the plaintiff might not resort to his general count in trover, upon the ground that the sale having been grossly fraudulent, and the conduct of the officers highly culpable; being founded, as was alleged in a conspiracy to despoil the plaintiff of his property; it avoided the protection of the writ to the sheriff, under which it was pretended to be made. But as it became unnecessary in the result for the Court to give any opinion on this point, the facts on which it was raised are not stated. The authorities referred to were the *six carpenter's case*, 8 Co. 146, where it was resolved that where entry, authority or licence is given to any one by the law, and he abuses it, he shall

(a) Per *Buller*, J. in *Gwinnet v. Phillips*, 3 Term Rep. 646. and in *Angerstein v. Clark*, 4 Term Rep. 616. *King v. Pippett*, 1 Term Rep. 235. *Hendray v. Spencer*, ibi 288, *Cuming v. Sibley*, ibi 289. and *Warre v. Harbin*, 2 H. Blac. 112.

be a trespasser *ab initio*. *Freeman v. Blewitt*, Salk. 409. and 1 Ld. Ray. 632. and 20 Vin. Abr. 501. pl. 16.

The Attorney-General, Jervis, Wigley and Hall, contra, insisted upon the variance between the count and the writ proved; the latter of which stated that the damages were given for two things, the detention of the debt, and the costs of suit; whereas the writ set forth in the count only alleged the damages to have been given for the detention of the debt. It was necessary for the plaintiff in charging the sheriff with negligence and improper conduct in the execution of a particular writ to set out that writ; and the variance, it was said, was in matter of description, which is fatal, according to the rule lately laid down in *Purcell v. Macnamara*, Ante, 157. They observed that in *Pilfold's* case, 10 Co. 116.b. 117. a., before cited, the word *damna* was admitted to have two several significations in law; the one proper and general, which included costs; the other relative and strict, which excluded them: and that *damna pro injuria illata, et pro expensis litis*, were two distinct things: and this distinction is an answer to all the other authorities cited, where the word *damna*, or damages, was used in its general signification. But in the writ proved it is plain, that the word *costs* is used in contradistinction or superaddition to *damages* for the detention of the debt; and therefore the word *damages* must there be taken in its relative and strict sense. If the declaration had merely stated, that the plaintiff had recovered so much for his damages; that might have been sufficient; but going on to state that the damages awarded were for detaining the debt; the allegation was disproved by the writ. The cases of *King v. Pippet*, *Cuming v. Sibley*, *Hendray v. Spencer*, and *Warre v. Harbin*, were considered, whether rightly or not, as allegations of substance, and not of description. But in *Rastall v. Stratton*, 1 H. Blac. 49, a declaration on a judgment for costs, stating the action to have been brought against one defendant only, when it was against two, was held to be fatal: and yet the other defendant having been outlawed, Vide S. C. 2 Term Rep. 366, judgment for the costs could only have been recovered by the one who sued on the judgment; and therefore in substance it was the same thing. So in *Savage v. Smith*, 2 Blac. Rep. 1101, in debt against a bailiff on the stat. 28 Eliz. for extorting illegal fees in executing a *feri facias*; even assuming that the plaintiff need not have set out the judgment on which the writ was founded; yet having set it out, he was held bound to strict proof of it as stated.

LORD ELLENBOROUGH, C. J. Two points have been made, one of which it is not necessary to decide; because if the judge did not leave the case to the jury upon the count in trover, no question can arise on it. But if the question had arisen, as at present advised, I should have inclined very strongly from the argument I have heard to have held, that if the sheriff, or his officers acting for him, depart so entirely and scandalously from their duty in making a mock sale of the goods in the manner which has been represented to us, it could not be considered as a sale in obedience to the writ of *feri facias*, but rather a conspiracy to despoil the plaintiff of his property, and would bring the case within the principle of the *six carpenter's* case, and make the sheriff a trespasser *ab initio*. To be sure, the instances there put are, with one exception, where the officer acts under a general warrant of law, and not by a particular mandate(a), as here; but one instance is that of a purveyor taking cattle by force of a commission for the King's use; where the selling of them afterwards in the market made the first taking wrongful(1). This point, however, is now withdrawn from the consideration of the Court. With respect to the other point, on the variance, I adhere to the distinction which was taken in *Purcell v. Macnamara*, Ante, 160, between allegations of matters of sub-

(a) Vide Cases collected in 20 Vin. Abr. Trespass, 501, 502.

(1) Vide *Waterbury v. Lockwood*, 4 Day, 287.

stance and of description. If the plaintiff had undertaken to set out the writ *in ipsius verbis*, or with a *prout patet*, &c. it would have fixed him to prove it exactly as he had described it: but here all that he undertakes to do is to state the substance of it, and he does this by stating that the writ was to levy 25*l.* for the debt and 80*s.* for the *damages* occasioned by the detention of the said debt: and this is substantially proved. The objection is, that by the writ itself it appears that the 80*s.* was awarded for the *damages* which the plaintiff had sustained as well for detaining the debt as for *costs*. But *costs* are a consequence by the statute of *Gloucester* of detaining the debt, and are part of the *damages*. In contemplation of law, the word *damages* emphatically includes *costs*. It is so considered by Lord *Coke*, and in the various authorities which have been cited. *Costs* therefore properly fall under the *nomen generale* of *damages*; and the whole 80*s.* may properly be stated as awarded to be levied for *damages* sustained by occasion of the detaining of the debt; though if it were necessary to come to a specification of the component sum of 80*s.* it would appear that part of it was for the *costs*. The detention of the debt is the cause of *damages* both in the peculiar sense of the word, and in respect of the *costs*. In the case of *Grenville v. Sandwich*, the error imputed was only repelled on the ground that the *damages* included the *costs*.

GROSE and LE BLANC, Justices, assented(a). The latter observed, that it was admitted, that if the allegation had been general, that the 80*s.* were awarded to the plaintiff for his *damages*, that would have done. Then what difference does it make when it is said for his *damages* "sustained by occasion of the detaining the said debt;" the *costs* being a consequence of such detention, and the law coupling them together under the general name of *damages*. The substance only of the writ being set out, the allegation was substantially proved.

Rule discharged.

Goodright, on the Demise of Ann Hoskins, v. Thomas Hoskins.

9 East, 306. Feb. 5, 1806.

By a bequest of leasehold to R. until his (eldest) son T. shall attain 21, and no longer; but in case T. shall die in minority, then to J. or O. (his younger brothers) or either surviving or attaining 21, as aforesaid; with a desire that R. would quit and deliver up the premises as aforesaid, and confirming the bequest of them to R.'s family on his relinquishment of a certain claim, which he did relinquish; held that T. on his attaining 21 took the estate by necessary implication; though there was a devise of the residue to N. the younger brother of H.

THIS was an ejectment for a messuage and lands, called *Roskief*, in the parish of *Saint Allen* in the county of *Cornwall*, and the demise was laid on the 13th of *March* 1805. At the trial at *Bodmin*, before *Graham*, B. a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

John Hoskins was possessed of the premises in question for a term of 99 years, still subsisting, and also of other leasehold premises, called *Boswellack*. On the 17th of *March* 1800, having two sons, *Richard* and *Nicholas*, and *Richard* having nine children, of whom *Thomas*, *John*, *Richard* and *Dorothy*, were four; *John Hoskins* made his will, in which, after giving to his wife, *Ann Hoskins*, an annuity of 10*l.* for her life, payable out of his interest in the leasehold premises of *Boswellack*, and 20*l.* worth of such articles of household furniture as she should select, are these words: "I also give and bequeath

(a) Mr. Justice Lawrence was absent.

"unto my beloved son *Richard Hoskins* 5 guineas, and desire that he may as soon as may be, be paid his wife's distributive share out of *Baswellack*, as the same was settled by bond made previous to my marriage, with my said wife *Ann*. I likewise give and bequeath unto my said son *Richard* the leasehold premises of *Roskief* in *Saint Allen* aforesaid, to hold the same unto my said son *Richard* until his son *Thomas* shall attain his age of 21 years, and no longer: but in case the said *Thomas Hoskins* shall die in minority, then my will is, and I do hereby give and bequeath the said leasehold premises of *Roskief* unto *John*, or *Richard*, sons of the said *Richard Hoskins*, or either of them surviving or attaining the age of 21 years as aforesaid. And I desire the said premises of *Roskief* may be quitted and delivered up as aforesaid by my said son *Richard Hoskins* accordingly. My will and meaning further is, and I do hereby particularly order and direct, that in case my said son *Richard Hoskins* do charge my executor, or claim or demand any interest, or compensation for the same, for the sum which may appear to be his wife's distributive portion out of *Baswellack*, as aforesaid; or any way attempt to defeat the purposes of my will; I do then and in that case revoke the said bequest of *Roskief*, and all other the legacies given him or his family, and do give him, the said *Richard Hoskins*, my son, five shillings only. But if, on the contrary, my said son *Richard* do quit all claim to the said interest on his wife's distributive portion as aforesaid, and in every other respect abide by the purposes of this my will; I do fully ratify and confirm the said bequest of *Roskief* in manner and form as aforesaid, and the other legacies herein after given to his family." He afterwards gave some small pecuniary legacies to different relatives; and, amongst others, three guineas to each of his grandchildren, and seven guineas in addition to his granddaughter *Dorothy*; and made his son *Nicholas* residuary legatee and executor; and also directed him to provide decent maintenance for his brother *Richard* during his life. *John Hoskins*, the testator, died on the 12th of *December*, 1804, possessed of the several premises mentioned in his will; leaving *Ann* his widow, the lessor of the plaintiff, *Richard* his son, and his three grandchildren, *Thomas*, *John* and *Richard*, surviving him; all of whom are now living. *Nicholas*, the testator's son, whom he made his residuary legatee and sole executor, died in his life-time. Administration with the will annexed, and administration of all goods, &c. undisposed of by the said will, was granted to *Ann Hoskins*, the lessor of the plaintiff, before *March* 1805. *Thomas Hoskins*, the grandson of the testator, who is about 25 years of age, entered upon the premises in question on the death of the testator, and has been in the possession of the same ever since. It is agreed that the want of assent by the administratrix shall not operate to the prejudice of *Thomas Hoskins'* claim. *Richard Hoskins*, the testator's son, never did any of those things, upon the doing of which these bequests to him and his family were revoked. If the plaintiff were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Dampier, for the plaintiff, said, that the only question was, whether by necessary implication *Thomas Hoskins*, the defendant, the testator's grandson, must take the estate of *Roskief*, as certainly there was no bequest of it to him in terms: and he denied the necessity of such an implication; the testator having given the residue of his property, not otherwise disposed of, to his son *Nicholas*, whom he made his executor, and charged with the maintenance of another relation for his life. The estate is given to the testator's son *Richard* until *Thomas* came of age; but there is no bequest of it at that period to *Thomas* himself; though it is given over to his brothers, if he should die before he was of age. It is probable, that the testator meant to have given it to *Thomas*, when he came of age; but he has omitted to do so, and the Court cannot supply that omission, as was held in *Chapman v. Brown*, 3 Burr. 1634, where the limitation to the second son of the broth-

ers's family who were the objects of the testator's bounty was by mistake omitted. Most of the cases where implications of this sort have been raised are, where the devise was of an estate of inheritance which was given over to the heir at law of the testator after the death, &c. of another; in which case that other must by necessary implication take, as the intention of the testator is expressed that his heir shall not have the estate till the event has happened. But here in the events which have occurred, the leasehold in question will fall into the residue as undisposed of. And he referred to *Rayman v. Gold*, Moore, 635, and *Horton v. Horton*, Cro. Jac. 74.

East, contra, mentioned the case of *Roe d. Bendall v. Somerset*, 5 Burr. 2608, and 2 Blac. Rep. 692, as in point, which called in question the two last mentioned cases; and also referred to the opinion of *Croke, J.* in *Roberts v. Roberts(a)*. But he was not called upon to argue the case;

The Court being clearly of opinion with the defendant.

And *Ld. ELLENBOROUGH, C. J.* said, we are glad to find ourselves warranted by authority in putting a construction upon the words of the will which it was manifestly the intention of the testator to express in favour of his grandson *Thomas*. For he first leaves the estate to his son *Richard*, the father of *Thomas*, until his eldest son *Thomas* comes of age: and in the event of *Thomas* dying in his minority, he gives it to his younger brothers. But he desires that the premises may be *quitted and delivered up as aforesaid*, by his son *Richard*; that is, when *Richard's* son *Thomas* came of age, to *Thomas*; for to whom else could *Richard* deliver up the possession in that event? and if *Richard* did what by the will he was directed to do, and which he is found to have done, the bequest of *Roskief* was confirmed to his family. To be sure, there is a strong implication from the words of the will that the testator meant that *Thomas* should have *Roskief* when he came of age, though it is not so expressed in terms: and the authorities bear out this construction(1).

Per Curiam,

Judgment of nonsuit
to be entered.

Soulsby v. Neving.

9 East, 811. Feb. 8, 1808.

After a landlord has recovered in ejectment against his tenant, he may maintain debt upon the stat. 4 Geo. 2. c. 28, for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit.

THE defendant, after having held of the plaintiff a farm at *Hallington* in *Northumberland* for 14 years, received a regular notice to quit on the 12th of *May* 1806, and the possession was then demanded of him; but he refused to deliver it up, and held over till the 7th of *Feb.* 1807; whereupon the plaintiff brought his ejectment against the defendant, and recovered possession: and afterwards brought this action of debt(a) upon the statute, 4 Geo. 2. c. 28, for double the yearly value of the premises in the interval between the expiration of the notice to quit, (which was the day of the demise in the ejectment), and the time of recovering possession under the ejectment. And

(a) 2 Bulstr. (123) 113, and vide *Goodright v. Goodridge*, Willis, 369, and *Cosen's* case, Owen, 29.

(1) Vide 6 Cruise's Dig. 191. & seq.

(a) The declaration was in the usual form; alleging the demise to and holding by the defendant; the demand of possession and notice in writing to deliver up the premises at the end of the term, on the 12th of *May* 1806; the subsequent refusal of the defendant, and his wilfully holding over for three quarters of a year after the 12th of *May*; and the annual value of the premises. Vide *Cobb v. Stokes*, 8 East, 358.

these facts being proved at the trial at *Appleby* before *Chambre, J.*, it was objected, on the part of the defendant, that the plaintiff having before recovered the premises by ejectment, and thereby treated the defendant as a *trespasser*, this action of debt upon the statute, in which, as it was said, the defendant was proceeded against as *tenant*, could not be maintained; the learned judge, however overruled the objection, and the jury gave a verdict for 440*l.* as for the proportion of the double yearly value: the defendant having leave to move the Court to enter a nonsuit, if the direction were wrong. A rule *nisi* for this purpose was obtained in *Michaelmas* term last, against which

Park and *Burrel* now shewed cause, and observed that the ground laid for obtaining the rule was, that after the plaintiff had recovered in the ejectment against the defendant, and thereby treated him as a trespasser, it was not competent to him to bring the present action; which was stated to be founded on contract, and in which the relation of landlord and tenant was recognized: but this they denied; and contended that the double value given to the landlord by the statute 4 Geo. 2. c. 28, upon the wilful holding over of a tenant after due notice was by way of *penalty*, and so it was noticed in the statute, considering the tenant as a wrong-doer; and therefore not inconsistent with the action of ejectment in which the recovery was had against him as a trespasser. In this action the demand was not as for *rent*, but for the double value of the premises wrongfully held over. The statute of the 4 Geo. 2, is differently worded, *Timmins v. Rawlinson*, 3 Burr. 1603, from that of the 11. Geo. 2. c. 19. s. 18, upon the same subject, and which latter directs that if a tenant, after giving notice to his landlord to quit, hold over, he shall pay double *rent*. This the Legislature thought sufficient when the landlord is satisfied with the continuance of the tenant; but the notice to quit proceeds only from the tenant. But where the tenant wilfully holds over against the landlord's notice to quit, the Legislature by the former statute have given the *double value*, by way of *penalty*, and not as *rent*; for in many instances the double *rent* would be no compensation to the landlord, for being kept out of possession of the land, and it might still be advantageous to the tenant to hold over at that rate. As to the case of *Wright v. Smith(a)*, it was clearly not determined, as stated in the marginal note of the report, on the ground that the action for the double value did not lie after a recovery by the landlord in ejectment; but on the ground that the statute which was meant to give a *penalty* against the contumacy of tenants, did not extend to a case where, without fraud or contumacy, the tenant had held over upon the faith of a lease granted *bona fide* under a power, which turned out to be invalid.

Raine and *Hullock*, in support of the rule, contended that the Legislature by the stat. 4 Geo. 2, only meant to give the landlord an election either to consider the tenancy as continuing, and to recover the proportion of double the annual value by way of rent; or considering the tenancy at an end, and the tenant a trespasser, to proceed by ejectment, and the subsequent action for the mesne profits; and in *Cutting v. Derby*, 2 Blac. Rep. 1077, the Court considered this action as standing in the place of an ejectment. But this is an attempt to confound the two remedies, and to recover double the yearly value of the farm as upon a continuing implied tenancy, after having treated the tenant as a trespasser during the same period, and ejected him upon that ground. If the statute had ever been considered as substituting this remedy in the place of the action for mesne profits, recourse would always have been had to it, as the more beneficial remedy for the landlord: and the absence of all precedent to warrant it after a recovery in ejectment affords a strong argument against it. Though, in one sense, the giving the double value was meant to operate as a penalty, yet it is not strictly so;

(a) Exchequer, Easter term 1805, reported in 5 Esp. Ni. Pri. Cas. 203.

for by the statute the tenant may be held to bail for the amount; which is never allowed in penal actions. The count in debt for the double value may be joined with other counts upon contracts.

LORD ELLENBOROUGH, C. J. There is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment: and the decision of the Court of Exchequer in *Wright v. Smith* evidently proceeded on the ground that the statute 4 Geo. 2, only meant to apply to the case of a wilful and contumacious holding over by the tenant, after notice to quit, and not to a *bona fide* holding over by mistake. The Legislature considered that the single value might not in many cases be a compensation to the landlord for having been kept out of possession by the misconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought *diverso intuitu*: the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong. Then came the statute 11 Geo. 2. c. 19., in which, where the tenant gives the notice to quit, and still holds over, the Legislature thought it was sufficient to give the landlord double rent, to be levied, sued for, and recovered in the same manner as the single rent was; giving the landlord therefore a right to distrain for it, which is a remedy applicable only to the relation of landlord and tenant. And the same statute recognises the party by the name of tenant, which the first statute does not. Upon the latter statute, therefore, there may be some incongruity in applying the remedy for double rent after the remedy by ejectment, which treats the person in possession as a trespasser; but there is no incongruity in this case. And as to the form of this action being in debt; that is not confined to cases of contract: for it is the form in which penalties on the game laws, &c. are recovered.

The other Judges agreed, that there was no inconsistency in bringing this action after the recovery in ejectment: and *Lawrence, J.* referred to Lord Mansfield's opinion in *Doe d. Cheney v. Batten(a)*, which seemed to import as much.

Rule discharged.

(a) Cowp. 245. The printed report inadvertently speaks of the landlord's being entitled to double *rent* by the statute 4 Geo. 2. c. 28, instead of double *value*; with this correction the passage will apply more strongly. I have a MS. note of the same case by Mr. Justice Buller in which Lord Mansfield is made to say, "If both parties intended" (i. e. by the landlord's receipt of the single rent for a quarter which became due after the time of the demise laid in the declaration;) "that the tenant should continue in possession, there is an end of the plaintiff's title: but if not; if it were meant merely by both that the landlord should only take the rent instead of the *double penalty*, that would not bar his remedy by ejectment." The same inadvertency, however, which has been noticed in the printed report seems afterwards to have occurred in the MS. which runs thus; (by Lord Mansfield) "There was another case at *Launceston*, when Mr. Justice Gould was at the bar, where an objection was taken that the plaintiff had brought an action for use and "occupation for rent accruing due after the time of the demise, and which action then stood ready for trial: and it was said, that that was an action founded on promises on a supposed permission of the plaintiff to occupy, which was a waiver of the notice. But the objection was overruled; and the plaintiff recovered in the ejectment, and afterwards in the action for use and occupation. And it was holden that one of the remedies was not a waiver of the other. Why? Because they were brought for several demands, to both of which the plaintiff was entitled: and one did not waive the other, because after the possession was recovered, the plaintiff had a right to double rent, if he had thought fit to sue for it." I suspect, that by the "double rent" here spoken of was meant double *value*; for the act of the 4 Geo. 2, is specifically referred to in other parts of the case, and no mention made of the 11 Geo. 2.: and with that alteration (which is besides confirmed by what fell from the Court in the case in judgment) this opinion is an authority in point.

Braswell v. Jeco.

9 East, 816. Feb. 10, 1808.

Order to amend writs of *scire facias* on a judgment and declaration thereon, conformably to the judgment roll.

THE Court, after hearing *Lawes* against a rule obtained by *Espinasse*, directed the two writs of *scire facias* issued upon a judgment(a), and the declaration in *scire facias* thereon, to be amended, by stating the judgment and proceedings in the original action to have been against the defendant as a common person, and not as an attorney, conformably to the judgment roll.

Rule absolute(b).

The King v. The Sheriff of London.

9 East, 816. Feb. 10, 1808.

The sheriff cannot relieve himself from an attachment for not bringing in the body, by payment of the debt sworn to and indorsed on the bailable writ since the stat. 43 G. 3. c. 46. s. 2., having neglected to take the money at the time of the arrest as directed by that act; but must pay the whole debt and costs.

THE defendant in the original action was arrested on bailable process indorsed for 60*l.*, and was liberated without giving any bail bond, or paying the debt sworn to and costs into the hands of the sheriff under the stat. 43 Geo. 3. c. 46. s. 2.: and bail not having justified in time, and the sheriff being attached, a rule was obtained on a former day, calling on the plaintiff in the original action to shew cause why the writ of attachment should not be set aside with costs, upon payment of the sum sworn to and indorsed on the writ, with costs up to the time when the same was tendered by the sheriff; which tender was made before the attachment. And in support of this rule *Gurney* relied on the late statute, which enabled a party arrested on mesne process, in lieu of giving bail to the sheriff, to deposit in his hands the amount of the debt sworn to and indorsed on the writ, together with 10*l.* to answer the costs then incurred; on payment of which the party arrested is to be discharged. This sum the sheriff is directed to pay into Court at or before the return of the writ; and if the defendant do not put in and perfect bail, the money is to be paid over to the plaintiff. This rule, he contended, was calculated to put the plaintiff in the same condition as he would have been in if the money had been originally paid to the sheriff. But,

Garrow, contra, objected that the sheriff, not having done his duty in the first instance by taking the amount of the debt sworn to and costs, as directed by the stat. 43 Geo. 3. c. 46, stood in the same situation of delinquency, as he would have done before that statute by liberating the party arrested without taking a bail bond; and in that case the Court never relieved the sheriff from an attachment regularly obtained, unless upon the terms of paying the whole debt(a) and costs. And he suggested that the plaintiff's demand was for 160*l.*

And of this opinion were the Court, who referred it to the Master to see

(a) In drawing up the rule nisi the judgment was improperly stated to be signed in this cause; but as no judgment had been signed in the cause now before the Court, those words were rejected as superfluous.

(b) Vide *Perkins, Administrator v. Petit*, 2 Bos. & Pull. 275, and the cases there cited.

(c) He referred to *Res v. The Sheriff of Surrey*, 1 Term Rep. 289. and *Heppel v. King*, ib. 370.

what was due to the plaintiff, and directed the attachment to stand as a security for what the Master should find to be due and for the costs.

The King v. Davis.

In the Cause of *Morrow v. Davis.*

2 East, 318. Feb. 10, 1808.

The costs of a suit in Chancery directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the commission, but the bankrupt remains liable to be attached for the amount under the award made a rule of Court.

ON the 10th of *March* 1807, the plaintiff and defendant in the action entered into arbitration bonds for 500*l.* which, reciting that a bill in Chancery had been filed against the defendant at the suit of the plaintiff concerning a partnership account between the defendant and the plaintiff's late husband, on which certain proceedings were had, and that a considerable sum was claimed to be due to the plaintiff, and that to ascertain the balance, it was agreed to refer the matter to an arbitrator; were conditioned to abide by and perform the award concerning all matters and differences between the parties, and all costs incurred by such suit, so that the award should be ready to be delivered before the 1st of *May* next. The arbitrator, on the 30th of *April*, awarded 205*l.* to be paid to the plaintiff on the 30th of *May*, as the balance due on the account, and a moiety of the expences of the award, and that the defendant should pay all the costs and charges of the suit in Chancery. On the 14th of *May*, the defendant became bankrupt, and a commission issued against him; and the commissioners allowed the debt awarded to be proved under the commission, but not the costs of the suit in Chancery, which were not then ascertained. The defendant obtained his certificate on the 13th of *January* 1808; and having refused to pay those costs, an attachment was sued out against him for non-performance of the award, which had been made a rule of Court.

Park now shewed cause against a rule for discharging the defendant from the attachment; and contended, at first, that a debt awarded to be paid on a future day after the bankruptcy was not proveable under the commission, and therefore the defendant remained personally liable to pay it. That the stat. 7 Geo. 1. c. 31., enabling debts on certain securities due at a future day to be proved under the commission, did not help the case, as that related only to certain instruments or other personal securities; and an award was not named amongst them. In *Baker's* case, 2 Stra. 1152, the sum awarded was due before the bankruptcy, and of course the bankrupt was entitled to his discharge by the certificate. (As to the debt, the Court observed that it was clearly due before the bankruptcy; the award only ascertained the exact amount of it. The only question was as to the cost.) He then contended that, at any rate, the attachment must stand for the amount of the costs of the suit in equity, which are only constituted a debt by the taxation, and are not proveable under the commission, though the order for taxation were made before the bankruptcy; according to the case *Ex Parte Sneaps, Co. Bank. Law*, 192. Cull. B. L. 107, on which he relied.

Littledale, contra, as to the debt, said that it existed before the arbitration bonds were entered into: and not only did the bonds recite that a balance was claimed to be due to the plaintiff, the amount of which the arbitrator was to ascertain; but also that costs had been incurred in the suit in Chancery, the payment of which he was to regulate. When therefore the costs were award-

ed to be paid by the defendant, they became a debt due under the arbitration bond executed by him, for which the penalty was a security before the bankruptcy; in like manner as if the precise amount had been incorporated into the bond. Where authority is given by one instrument to do an act, which is afterwards done, it is the same as if the particular act were directed to be done by the original instrument, *Johnson v. Hodson*, 8 East, 38. In *Pattison v. Bankes*, Cowp. 640, a bond for payment of an annuity for a term of years was held to be within the stat. 7 Geo. 1. c. 31, though the penalty were not forfeited at the time of the bankruptcy. And as a verdict given before the bankruptcy attaches to it the costs, though not taxed till afterwards; so here the award having ascertained the right to the costs in equity before the bankruptcy, they will follow the debt awarded in the same manner, though not taxed; and are consequently proveable under the commission when ascertained.

The Court inquired whether the case *Ex parte Sneaps* had ever been overruled; and being answered that it had not, and that the practice since that decision had always been in conformity to it: Lord *Ellenborough* observed, that no argument could put the award of the arbitrator higher than the order of the Court of Chancery itself: and Lord *Thurlow* having in that case held, that the costs taxed after the bankruptcy were not inchoate with the order for taxation made before, this Court could not consider them as inchoate with the award. Thereupon

The Court directed, that on payment by the defendant of the costs in the Chancery suit directed to be paid by the award, he should be discharged from the attachment.

Vanbrynen and Others v. Wilson.

9 East, 321. Feb. 11, 1808.

The Court would not stay judgment and execution, on a summary application, because the plaintiffs after verdict became alien enemies.

THIS cause had been referred by an order at *nisi prius* to an arbitrator to assess the plaintiff's damages; which he had done, and the verdict was entered for the sum awarded; and after an ineffectual attempt on the part of the defendant to impeach the propriety of the arbitrator's calculation, upon a rule which was discussed on a former day in this term and discharged; *Richardson* now moved that judgment and execution should be stayed on bringing the money recovered by the verdict into Court, if the Court should think that necessary: upon the ground that the plaintiffs had since the verdict become alien enemies. And being asked by the Court, if he had any case to cite where they had so interfered in a summary way; he answered in the negative: but said that in all cases where an *audita querela* would lie, the Court were now in the practice of giving summary relief, to avoid the expence of that mode of proceeding(a).

The Court, however, said that if the defendant had any such remedy by law, he might avail himself of it, if so advised; but that they would not interfere in the manner proposed, on such an occasion.

Rule refused.

(a) Vide Anon. 1 Salk. 98.

Collins v. Poney.

9 East, 322. Feb. 11, 1808.

In trespass against the owner of a house adjoining to the plaintiff's in the metropolis for taking down his party-wall and building on it, the defendant shewing at the trial that he was authorized in doing the thing complained of under the building act 14 G. 3. c. 78, is entitled to treble cost under the 100th section, upon a nonsuit.

THE plaintiff brought trespass against his neighbour for taking down a portion of his party-wall between their two houses in the metropolis, and building upon it; but it appearing that the defendant was authorized in what he had done by the provisions of the building act, 14 Geo. 3. c. 78., the plaintiff was nonsuited. And the defendant then obtained a rule calling on the plaintiff to shew cause why a suggestion should not be entered on the roll, that this action was brought for acts done in pursuance of the statute; and why the master should not tax the defendant his treble costs of the action and the costs of this application.

Garro and *Manley* now shewed cause, and contended that the 100th section of the act, which gives treble costs to the defendant if a verdict be given for him, or the plaintiff be nonsuited in any action brought "for any thing done in pursuance of the act," was only intended to protect justices of the peace, or other public officers, who did any thing by virtue of their offices in the execution of the act; though the words of the clause are general, that "no action shall be commenced against *any person or persons*, for any thing done in pursuance of this act," &c.: and it does not extend to private persons, like the defendant, who take on themselves to do the act complained of. The first forty sections of the act regulate the mode of building party walls, and point out the manner of settling differences in the progress of it. The 41st section regulates the proportion which the owner of the adjoining house, deriving benefit from a party-wall when built, shall pay towards the expence of it; and gives an action to recover it, if it be not paid, with *double* costs of suit to the plaintiff, if he recover the full sum claimed. Now, there could be no reason for giving a plaintiff, when he sued rightfully for that which the act entitled him to, a less rate of costs than was given to a defendant if wrongfully sued for any thing done under the same act: which shews that the 100th clause was meant to apply to a different description of persons. Then follow some further regulations as to building from the 41st to the 61st sections inclusive. By the 62d section surveyors are to be appointed, whose duties are pointed out: and jurisdiction is given to justices of peace for the recovery of penalties by various subsequent clauses: and by section 87, distresses are not to be avoided for want of form: and by section 88, no action shall lie for any irregularity, if tender of sufficient amends be first made. And it was to protect the justices and other subordinate officers who were required to do certain acts in the execution of the duties imposed on them, that the provision for treble costs was made in the 100th section.

The Attorney-General, Park, and Marryat, contra, insisted upon the general wording of the 100th clause, which extended to cover *any person for any thing done in pursuance of the act*; and therefore included this defendant, though neither magistrate nor surveyor. If the Legislature had intended to confine the protection to public officers, it would have used the same appropriate words of description as are to be found in other acts having such persons in view. The defendant would have been a trespasser, unless for the protection of the act: and if instead of pleading the general issue, (which is only given by the 100th clause) he had pleaded specially, that what he did

was done in pursuance of the act, it must have been found for him: for if not so done, there must have been a verdict for the plaintiff.

The majority of *The Court* agreed that the words of the 100th clause were too general and strong to be gotten over: and therefore considered this case as falling within it, especially as the same clause gives the plea of the general issue to any defendant sued for any matter or thing done in pursuance and by the authority of the act, by which alone the defendant could justify what he had done.

LE BLANC, J., who thought that the case was not within the intention of the Legislature in framing that clause, admitted that he felt himself hampered by the general words of it.

REGULA GENERALIS.

Hilary Term, 48 Geo. 3. 1808.

Special bail in trover.

IT IS ORDERED, That from and after the last day of this present *Hilary* term, no person be held to special bail in an action of trover or detinue, without an order made for that purpose by the Lord Chief Justice, or one of the Judges of this court.

Andrews v. Palsgrave.

9 East, 325. Feb. 12, 1808.

In a special count on a policy, the risk was stated to continue until the ship was unloaded: and there were common counts: held that the premium having been paid into court generally was an admission of the contract stated in the special count; and that it was not competent to the defendant to shew that the policy by which the risk was originally made to cease after the ship was moored 24 hours in safety was afterwards altered by the broker without the defendant's knowledge. But the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of costs; and the plaintiff thereupon determining to take the money out of court, and not to proceed further, is entitled to all the costs of the action, and not merely to the usual costs of a new trial.

THE declaration contained a special count on a loss by barratry, on a policy of insurance on the ship *Mercurius*, at and from *London* to *Tobago*, continuing the risk until the ship was unloaded; and also the common counts. The defendant paid the premium into court generally: and at the trial offered to prove, that by the original terms of the insurance agreed to by the underwriters the risk was only to continue for 24 hours, and that it was afterwards altered by the broker without their knowledge. But Lord *Ellenborough*, C. J. held that the payment of money into court generally was an admission of the policy as stated in the declaration; and the plaintiff had a verdict(1). The next cause in the paper at the sittings was by the same plaintiff against *Suart*, another underwriter on the same policy; in which the premium had been paid into court upon the count for money had and received: and the broker proving the alteration to have been made, as above stated, the plaintiff was nonsuited. The defendant *Palsgrave*, in last *Michaelmas* term, obtained a rule to amend his former rule for paying money into court, by confining it to the count for money had and received; and also for

(1) As to the effect of payment of money into court, see *Burrough v. Skinner*, 5 Burr. 2640. *Elliot v. Callow*, 2 Salk. 597. *Cox & al. v. Parry*, 1 Term Rep. 464. *Walkins v. Towers & al.* 2 Term Rep. 275. *Baillie v. Cazelet*, 4 Term Rep. 579. *Yate v. Wilan*, 2 East. 128, explained and limited by *Clarke v. Gray*, 6 East. 570. *Guthridge v. Smith*, 2 H. Bl. 374. *Guillot v. Nock*, 1 Esp. 247. *Bennett v. Francis*, 2 Bos. & Pull. 560. *Rucker & al. v. Palsgrave*, 1 Campb. 557. 8 C. 1 Taun. 419. *Horsburgh v. Orme*, 1 Campb. 558. in notis. *Johnston v. The Columbian Insurance Company*, 7 Johns 315.

a new trial on payment of costs; upon which the plaintiff determined not to proceed to a new trial, but to take the money out of court; and upon the taxation of costs contended before the Master that he was entitled to the whole costs of the action: but having admitted, in answer to the Master's inquiry, that he should have still proceeded to trial, though the premium had been paid into court on the common count alone, the Master allowed only the usual costs on a rule for a new trial.

Garrow, Park, and Bosanquet now shewed cause against a rule obtained on a former day for the master to review his taxation; insisting that it was right; or that at any rate, if the plaintiff were entitled to more, it could only be the costs up to the time of the original payment into court. But

The Court (stopping *The Attorney-General* and *Gaselee* in support of the rule) said, that when the defendant applied to amend the rule for paying money into court, he applied for a favour, which he could only have upon the terms of paying all the costs incurred since the original rule; and that the plaintiff was by the terms of the original rule entitled to the costs of the action, if he took out the money. They therefore made the rule absolute to review the taxation.

CASES
IN
EASTER TERM,

IN THE FORTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

MEMORANDUM.

IN the course of the last Vacation, Sir *Giles Rooke*, Knt., one of the Judges of the Court of Common Pleas, died; and was succeeded by Mr. Justice *Lawrence*, who resigned his seat on the Bench of this Court. And in this Term *John Bayley*, Esq. Serjeant at Law, was appointed a Judge of this Court, and on *Monday* the 9th of *May*, took his seat on the Bench, and was afterwards knighted.

Carrett v. Smallpage and Others.

9 East, 330. May 5, 1808.

By the long established and recognized practice of the court, a writ of *capias*, with a *non omittas* clause, may issue in the first instance, and be executed by the sheriff within a particular liberty, (such as the honor of *Pontefract* in the county of *York*) the bailiff of which has the execution and return of writs, without a prior writ of *latitat* first issued, and a return made by the sheriff of *mandavi ballivo qui nullum dedit responsum*: and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was *wrongfully, injuriously and deceitfully* caused to be issued by him to the damage of the bailiff in his office, &c.

IN an action on the case for an injury to the plaintiff, as bailiff of a franchise, the first count of the declaration stated, in substance, that the liberty and franchise of the honor of *Pontefract* in the county of *York*, from time immemorial, had the return of writs and an office of bailiff, and that the bailiff of right ought to have within the same the execution and return of *all* and singular writs, precepts, and process, of all and singular the courts, justices, commissioners and escheators of the king and his predecessors, with divers fees, &c. arising therefrom: which office during all that time has been granted and grantable by the person for the time being seised of the said liberty, &c. That no sheriff of the county of *York* ought to be commanded by virtue of any writ(a) issuing out of *B. R.* that he should not omit by reason of any liberty in his (the sheriff's) bailiwick, but that he should enter and take the person in such writ named, if he should be found within the same, to answer, &c. unless a common *latitat* writ should first have issued out of the same court, commanding such sheriff to take the same person if he should be found in his (the sheriff's) bailiwick, and he should have returned, that he had made his mandate to the bailiff of the said liberty to arrest such person named in the said writ, to which the said bailiff had not given any answer. The count then stated, that the king, on the 13th of *July* 1801, was and still is seised in right of his duchy of *Lancaster* of the said lib-

(a) i. e. *special non omittas capias ad respondendum writ.*

erty, &c. of *Pontefract*, and that by indenture of that date he granted and demised to the plaintiff the office of bailiff of the liberty, and the execution and return of *all* and singular writs, &c. (as before) with all and every the fees, &c. arising therefrom, *habendum* for 31 years at a certain rent; which indenture was inrolled, &c.: by virtue of which the plaintiff became bailiff of the said liberty, and still is in possession of the said office of bailiff, and has the execution of all and singular such writs, precepts, and process, within the said honor, &c. and by reason thereof lawfully entitled to all and every the fees, &c.: yet that the defendants well knowing the premises, and that no writ of *latitat* at the suit of the defendant *Smallpage* against *M. Dormer* had first issued out of *B. R.* to the sheriff of *Yorkshire*; but intending to prejudice and aggrieve the plaintiff, as such bailiff, and to deprive him of the fees, &c. of his said office; afterwards, on the 23d of *July* 1806, *wrongfully, injuriously and deceitfully caused and procured* to be issued out of *B. R.* against the said *M. D.* a certain writ of the king called a *non omittas capias(a)*, tested the 25th of *June* in *Trinity* term then last past, according to the usage and practice of the said court, directed to the sheriff of *Yorkshire*, by which he was commanded that he should not omit by reason of *any* liberty in his bailiwick, but that he should enter the *same*, and take the said *M. D.* &c., to answer to the defendant (*Smallpage*) of a plea of trespass, &c.; according to the custom of the said court of *B. R.*, &c.; which said writ of *non omittas capias* the defendants afterwards, and before the return thereof, viz. on the 30th of *July* 1806, *wrongfully, injuriously and deceitfully caused* to be delivered to the sheriff of *Yorkshire* to be executed; by virtue of which writ the said sheriff, without the licence and against the will of the plaintiff, afterwards, and before the return thereof, to wit, on the 9th of *August* 1806, entered into the plaintiff's said liberty, and caused the said *M. D.* to be taken within the plaintiff's said liberty, to answer to the defendant *Smallpage* according to the exigency of such writ; whereby the plaintiff lost and was deprived of divers fees, &c. which would have accrued and of right belonged to him as such bailiff if he had been commanded to take the said *M. D.*, and had caused him to be taken within his said liberty to answer, &c. The 2d count stated that the plaintiff was lawfully possessed of the office of bailiff of the said liberty, &c. and lawfully entitled to the execution of *all* writs, &c. for the taking of any defendant at the suit of any person in any action issuing out of *B. R.* to be executed within the said liberty, and to all fees, &c. arising therefrom, unless a return should have been made to the court by the sheriff, &c. upon a former writ issued out of the same court, at the suit of such person, against such defendant, to warrant the issuing of a special writ called a *non omittas*, commanding such sheriff, &c.: yet that the defendants well knowing the premises, and that no return had been made to *B. R.* upon any writ issued out of the same court at the suit of the said defendant *Smallpage* against *M. D.* by any sheriff of *Y.* to warrant the issuing of such special *non omittas* writ; but intending to prejudice and aggrieve the plaintiff as such bailiff, and to deprive him of his fees, &c. on the 28th of *July* 1806 *wrongfully, injuriously, and deceitfully caused and procured* to be issued out of *B. R.* a *non omittas capias* writ, &c. (as before). Plea, the general issue.

The cause was tried before *Chambre, J.* at *York*, and on the part of the plaintiff several charters made in the reigns of *Ed. 3.* & *Hen. 4.* were read from an ancient book belonging to the duchy of *Lancaster*, called the Great Coucher Book, to prove the immemorial existence of the liberty, and the title of the crown to it, as part of the duchy. The grant of the office to the plaintiff was also proved, reciting a former grant to *Robert Parker*; and four counterparts of leases were produced in 1749, (reciting one in 1704) 1766, 1766, and the last in 1786 to *Parker*: all which corresponded with the plaintiff's lease as set forth in the declaration, in the description of the office, and of the

(a) This was incorrectly called a *non omittas latitat* writ in the declaration.

execution and return of writs, &c. The execution of the office was proved by bail-bonds taken in the name of the chief bailiff of the liberty for the time being from 1738 downwards; by mandates from the sheriff as far back as 1765; and by parol testimony of the execution of many such mandates every year in other liberties in the county as well as in the liberty in question. But most of the witnesses also proved, upon cross-examination, a very general practice to issue and execute writs of *non omittas capias* within the liberty in the first instance. It also appeared, that there was a prison within the liberty kept up by the chief bailiff, whose fee upon an arrest was one guinea. That the writ in question was executed within the liberty; and that the defendant's attorney declared that he had issued the *non omittas* in the first instance purposely to try the right, and that he would indemnify the defendant and his agent. It was then objected on the part of the defendant, that the plaintiff had failed in proving his exclusive right to the execution and return of *all* writs, &c. in the extent in which it was averred in the declaration; and the opinion of Lord Hale in the case of *Sir Robert Atkins v. Clare*, 1 Ventris, 406, was referred to, shewing certain writs which the sheriff might execute within a liberty: and on this objection the plaintiff was nonsuited.

Park, Topping, and Holroyd in last Michaelmas term, shewed cause against the rule for setting aside the nonsuit; insisting that the allegation in the declaration, that the bailiff in the said liberty had the execution and return of *all* writs, &c. within the same, was material and was laid too largely; inasmuch as there were several exceptions known to the law, and recognized in the books: such as writs of *quo minus* out of the Exchequer, *Sir Robert Atkins v. Clare*, 1 Ventris, 399, 406; writs of waste, *Ibid.* and Stat. 13 Ed. 1. c. 14; of deliverance by replevin, Stat. Westm. 1. c. 17. *Gilb. Hist. of C. B.* 28; of re-disseisin, *Ibid.*; of all writs to which the King is party, *Plowd.* 216. 243. 5 Co. 91. b. 92; or to which the bailiff of the particular franchise is himself a party (a); so of writs of inquiry, 5 Com. Dig. Retorn. D. 3. cites *Hob.* 83, and of *distringas juratores*, *Ibid.* and 19 H. 6. 67. a.; all of which must be executed and returned by the sheriff to whom they are directed, whether within liberties or without. [Lord *Ellenborough*, C. J. observed, that in the case of *Sir Robert Atkins v. Clare*, in *Vidian's Entries* 55, the declaration was in the same general form as this; and no such objection was taken; though, as it appears from the report in Ventris, that case was very much canvassed and contested. And he asked whether the general allegation of the bailiff's having the execution and return of *all* writs, &c. must not be understood of all writs whereof such bailiffs may have the return by law.] To this they answered, that the bailiff of this franchise might have had the return of *all* writs by private act of parliament; and after verdict it would have been taken that he had proved his allegation by any mean by which it could have been proved. But supposing the allegation to be confined to all writs returnable by bailiffs, still the claim would be laid too largely; for the plaintiff claims that no *non omittas* writ should issue into his bailiwick until he himself has made default to the sheriff's mandate; whereas it is clear that it may, even according to the more ancient practice of this Court, if the bailiff of any other liberty within the county have received the sheriff's mandate and made no return.

But if the nonsuit could not be sustained on this ground; still they contended that the Court would not send the cause to a new trial, if, on principle, the action were not maintainable. And they urged that the practice of the Court, which had existed at least since the year 1739, of issuing *non omittas* writs in the first instance, had sanctioned the right to do it at least so far as to secure the party suing out such a writ, according to the custom of the Court, from answering for it as a wrong doer. In 1739, the bishop of *Ely*

(a) By analogy to the rule of the common law in like cases.

put up a notice in the K. B. office(a), warning the officers of the Court against issuing *non omittas* writs into his franchise of *Ely*, without first issuing previous process to warrant the same; on which a *mandavi ballivo* was returned by the sheriff and filed; and threatening with an action any officer who did the like again: but in fact no action was brought, though the practice continued as before. It was always considered, Co. 92, that if a *feri facias* or *capias* were awarded to the sheriff, and he made his mandate to the bailiff of a liberty having return of writs, who made no answer, another writ might issue to the sheriff with a clause of *non omittas propter aliquam libertatem*, by virtue of which he might seize the goods or arrest the body of the debtor not only within that liberty the bailiff of which had made default to the *mandavi ballivo*, but also within any other liberty in the county; though the bailiff of such other liberty had made no such default. The same is stated to have been practised in K. B. in *Gilbert's Hist. of C. B.* 29.: though in C. B. it is otherwise; for there the *non omittas* process recites the common *capias*, and the sheriff's return of *mandavi ballivo qui nullum dedit responsum*, and then it empowers the sheriff to enter that liberty. The practice, however, of issuing the *non omittas* process in the first instance, has been long established, and is recognized in all the modern books of practice(b); and was lately confirmed by the Court upon an application by the bailiff of this very liberty to restrain the issuing of *non omittas* writs in the first instance; which was refused: and such practice, being in furtherance of justice, and to prevent delay, ought not now to be overturned after the experience of near a century in its favour. The issuing of the writ is in some respect the act of the Court, though at the suggestion of the party; and if it were irregularly issued, the party grieved should rather have applied to the Court to quash it, *quia improvide emanavit*, than bring an action against the party who sued it out, thereby treating him as a wrong doer. For at least, the process is legal, otherwise the party arrested under it might maintain trespass; which clearly he cannot do. It is not a void process, like a *testatum* writ issued without a prior writ to warrant it, which would make the party executing it a trespasser; though the Court, on application in such a case, would afterwards order such prior writ to issue antedated, in order to authorise the *testatum* writ.

Lord ELLENBOROUGH, C. J. at the conclusion of the argument of the defendant's counsel on shewing cause in the last term, addressing himself to the plaintiff's counsel upon this last ground of objection, said, If this action can be maintained, I see no reason why an action may not lie against a party for issuing a writ of *latitat* without a prior bill of *Middlesex* to warrant it; for what else but the practice of the Court has made the *latitat* issuable in the first instance: but time has run upon the one practice and the other, and has legitimated them both. The case of the *latitat* is even stronger than this of the *non omittas* writ; for that contains a suggestion of facts which are not true, namely, the issuing of the former process, and its return, &c. The master has furnished us with his note of what passed on the application to this Court, in Mich. 37 Geo. 3, which has been alluded to. ["M. 37 Geo. 3. Mr. *Erskine* applied to the Court, on behalf of Mr. *Lang*, officer of the liberty of *Pontefract*, to restrain the officers of this court from issuing *non omittas latitats*, without having a previous writ directed to and returned by him. The Court, on the application to the master, finding it had been an universal practice to issue the *non omittas* writs in the first instance, and as no precedent could be produced to support the application, refused to interfere."] Now, if the Court, after having refused an application of this sort, should

(a) Vide Rules and Orders of K. B. Trin. 1789.

(b) Vide 1 Tidd's Prac. ch. 4. Imp. New Instr. Cler. 7th edit. 178. Lilly's Pract. Reg. tit. *Non Omittas*.

suffer an action like the present to be maintained, we ourselves shall be the wrong-doers. After an acknowledged practice for above 70 years at the least, recognising the course pursued by this defendant, and after an application on behalf of the bailiff of the franchise to correct the practice; on which the Court refused to interfere when the question of its legality was brought directly home to their attention; how can a suitor who has sued out the accustomed process of the Court be treated as a wrong doer? How can he be said, in the words of the declaration, to have "wrongfully, injuriously, and deceitfully" caused that to be done, which the Court have authorized in practice for so long a period, and against which they positively refused to interfere when called upon eleven years ago? It would be making the decision of the Court a snare to parties.

Walton and Littledale, in support of the rule for a new trial, admitting that the modern practice had prevailed as stated, said that this action was brought in order to try the legality of it: for if it were well founded, the value of the franchise would be entirely lost. And as to the late case referred to, it ought not to conclude the question; for the Court often refused relief on summary application, which might be had in a more regular way; referring the applicant to his legal remedy if he had any: and that is now sought by the present action. But as this was a new point, which they said they had not had so full an opportunity as they wished of considering, the Court adjourned the argument till this term; when it was resumed by the plaintiff's counsel.

As to the first objection, to the generality of the allegation, at any rate it does not apply to the second count, which does not claim for the bailiff the return of *all* writs generally, but only of all writs of *capias* out of *B. R.*: neither does that count require that there should have been a previous mandate to the particular bailiff of this franchise with a *nullum responsum* from him; but a *mandavi ballivo* to any bailiff of a franchise within the county, and *nullum responsum* returned, would be sufficient to sustain the second count. The only objection, if any, which can in strictness apply to that count, is, that it does not except writs in which the bailiff is a party; but this, as well as the rest, is open to the answer which has already been suggested by the Court, that the claim of the return of *all* writs must be understood of all writs returnable by the bailiffs of franchises. For as an allegation of law need not be made, and, if made, need not be proved; so where the law allows an exception, it is not necessary to notice it in the allegation of a general claim. Even a mistake in alleging matter of law will not hurt, if sufficient be stated, without that, to maintain the action (a). In one sense too, the bailiff may be said to have the execution of writs to which he himself is a party; for *Dalton's Office of Sheriff*, 463, says, that he may make another bailiff for that purpose; which is in effect doing it by deputy. They also contended that this general mode of pleading, claiming the return of all writs, &c. was warranted by the precedents. *Vidian's Entr.* 55. The case of the hundred of *Gloucester*. *Thomps. Entr.* 42. *Brownl. Red.* 49. *Reg. Brev.* 82 a. 104. and *Herne's Pleader* 224, and *Cary v. Bacchus*, 1 *Show.* 17, 18. They also referred to Lord *Coke's* comment, 2 *Inst.* 453, on the statute of *Westminster* 2. c. 39.; who says that this branch, concerning the *non omittas*, is in affirmance of the common law; and refers to *Bracton*, lib. 5. fo. 442. a., where the sheriff is commanded *quod non omitteret propter libertatem talem, quin, &c.*; and to *Fitz. N. B.* 74 a., where the form is, that the sheriff is commanded that he do not omit because of the liberty aforesaid, &c.: though it had been long agreed, and was not now disputed, that a *non omittas* writ might issue into any *bailiwick* in the county after a *mandavi ballivo, &c.* to any one, and

(a) By *Jones and Doderidge, Jr.* in *Drops v. Thaire*, *Latch*, 127, and *Williamson v. Allison*, 2 *East*, 450.

nullum responsum returned. And they shewed a precedent in 19 H. 6. 67. a., where the Court amerced the sheriff for returning a *mandavi ballivo, qui nullum dedit responsum*, to a writ of *distringas juratores*, on account of the great inconvenience of such a practice.

As to the principal objection, which goes to the right of action, all the precedents of actions against sheriffs and under-sheriffs by the owners of independent liberties for executing *non omittas* writs there, without a prior writ and *mandavi ballivo*, &c. returned, proceed upon the ground that it is an injury which the law notices: for the bailiff of the franchise thereby loses the fees which he would otherwise have for executing the process: and power being given to him by the royal grant to return all writs within the liberty, in exclusion of any other officer, it is the same as if the liberty were taken out of the county for that purpose. It is a legal right or privilege paramount to any practice of the court, and cannot be governed by it. The practice, therefore, which has of late years prevailed, of issuing *non omittas* writs into these liberties in the first instance, is not analogous to the practice of issuing a *latitat*, without a prior bill of *Middlesex* to warrant it; for the bill of *Middlesex* is only a *precept* of the court, 1 Tidd's Pract. 33. 41, and not a *writ*; it has no direction or *teste*; and therefore it is purely within the discretion of the court to issue or omit it: the practice therefore may well warrant the omission of it. But in the case of *writs*, the issuing of them is a matter of right essential to the jurisdiction of the Court, and cannot therefore be omitted by any practice, even if it were of longer standing than it is: but it appears by the *Instructor Clericalis*, published in 1727, that it was not then established, as at present; for the usual practice is there stated to be, to sue out a common *latitat* and a *non omittas* writ at the same time: though that itself was a recent encroachment, as appears by the older authorities. The mere circumstance of the writ issuing by the authority of the court will not protect either the plaintiff or his attorney from answering in damages as wrong-doers, if it be issued illegally; for those who set the power of the court in motion are answerable for the consequences. As in *Barker v. Braham* and *Norwood*, 3 Wils. 368, where Mrs. *Braham* having obtained judgment in a former action against Mrs. *Barker*, as administratrix of her deceased husband, upon a bond debt of the intestate; after levying part of the sum recovered out of the assets in her hands, sued out by *Norwood* her attorney a *capias ad satisfaciendum* against Mrs. *Barker*, without any suggestion of a *devastavit*, under which she was taken and imprisoned: and both Mrs. *Braham* and her attorney *Norwood* were holden liable in trespass at the suit of *Barker*. [Lord *Ellenborough*, C. J. There was no record there which warranted the issuing of a writ of *capias ad satisfaciendum* against the party and therefore those who sued it out could not justify under it: but here there was a legal writ under which the party suing it out could have justified in trespass. That the arrest itself under a *non omittas* writ is not illegal is shewn by the case of *Fitzpatrick v. Kelly*, cited in 3 Term Rep. 740. *Le Blanc*, J. The question in the case in *Wilson* was, whether the defendants who had caused the plaintiff to be arrested, and were therefore *prima facie* trespassers could justify the caption under the writ of execution which they had sued out: and the writ itself being unwarranted by any judgment, their justification necessarily failed.] The case of *Fitzpatrick v. Kelly* admits that the party making the arrest is liable to answer to the owner of the franchise thereby violated: and this also appears from 20 H. 7. fo. 7. a. All the authorities too agree, that an action lies by the owner of the franchise against the sheriff or officer who invades his liberty, and makes the arrest there without legal authority. And in *Grant v. Bagge*, 3 East, 123, it was held, that a writ of *fieri facias* directed (in the first instance to the bailiff of the royal franchise of *Ely*, out of this court instead of to the sheriff of *Cambridgeshire*, who should have issued his man-

date to the bailiff,) was erroneous and void, and that the bailiff executing it was guilty of a trespass against the party whose goods were taken under it: and upon the same principle it must lie against the party who illegally sues out a *non omittas* process in the first instance. [Lord *Ellenborough*. That does not follow: every sheriff or other officer is bound to know the limits of his jurisdiction: or if the case be doubtful, he may apply to the court and state the special circumstances. In the case of *Grant v. Bagge*, one who was no officer of the court took upon him to execute process illegally directed to him, there being no practice to warrant it; but here the defendant has done no more than follow the usual practice of the court long established: and can we suffer him to be treated as a wrong-doer for that? It might have been a different question if he had made any false suggestion or representation to our officer to induce him to issue a *non omittas* writ, without which another sort of process would have issued in course.] It is no objection that this is the first instance of an action of the kind brought since the practice has prevailed, (if the fact be so); for during all this period the bailiffs of franchises appear to have exercised their rights, and taken their accustomed fees; and while they were still deriving profit from their offices, it was not worth while to incur the risk and expence of an action in a particular instance. But now that the question is at length raised, if the court hold that no action will lie for the violation of the franchise, it will in effect abolish the franchise itself.

Lord ELLENBOROUGH, C. J. There might be some question whether the present ground of nonsuit can be sustained; whether the plaintiff could claim the execution and return of *all* writs, &c. when there are various exceptions, such as writs of waste, re-disseisin, cases in which the king is party, or in which an informer sues as well for the king as for himself, and others which have been mentioned, in which the process is to be executed by the sheriff. And though several precedents have been shewn in favour of this general mode of declaring, particularly that in *Vidian*, touching the liberty in question; yet the authority of Lord *Hale* in the latter case cannot well be urged in confirmation of it, because the frame of the declaration was not considered by him at all, though he went very fully into the other parts of the case. But independent of the particular ground of the nonsuit, it would be frivolous to send down the case to a second trial, if it appear to us, as it does, that the plaintiff would not be able to sustain a material allegation in his declaration namely, that the defendant "*wrongfully, injuriously, and deceitfully*" caused and procured the writ in question to be issued. How can we say, in a case where the court, at least as far back as 1727, has been in the practice of issuing the *non omittas* writ, without first issuing a common *latitat*, and waiting for the return from the sheriff of a *mandavi ballivo* with *qui nullum dedit responsum*; and after Lord C. B. *Gilbert* has recognized that practice as existing in his time; and when we know that objections were made to the practice of taking out *non omittas* writs in the first instance so far back as 1739, and actions threatened, but still it continued, and is recognized as the usual practice in all the books on the subject since that time; and no instance can be produced during all this time of any action brought against a party suing out such a writ: how can we say, that the plaintiff can be considered as a wrong-doer for issuing such a writ, according to this long established practice of the Court. If this may be done, I know not what process may not be shaken: for, as I before observed, the issuing of a *latitat* without a previous bill of *Middlesex* stands only on the practice of the Court: and that instance is the stronger, because the *latitat* contains a false recital of facts on which it professes to be grounded. [His Lordship referred to *Style's Prac. Reg.*] The subject, however, has not passed wholly *sub silentio*; for in 1796, an application was made to set aside a *non omittas* writ issued in the first instance into this very liberty; which the Court refused. Is it then to be expected, that after the question has been brought directly to the notice of the Court,

and they have refused to restrain the issuing of such a writ on the ground of its illegality, a party suing is to be wiser than the Court in discovering the illegality of its process : and if he be not, that he is to be treated as a wrong-doer for having issued a process, the issuing of which the Court when called upon refused to recal or condemn. It is clear, therefore, that the plaintiff must fail in proving a substantive and material allegation in his declaration ; and therefore it is needless to set aside the nonsuit.

GROSE, J. It is not necessary to inquire into the precise ground of the nonsuit, because, upon the general objection taken by my Lord, it would be useless to grant a new trial. For the practice has long prevailed and is now clearly established, that a *capias* with a *non omittas* clause may be taken out in the first instance : and the case which occurred in 1796, fortifies the old practice, and was a recognition of it by the Court. It would therefore be in vain to send the record down to a second trial, when the plaintiff must again be nonsuited on this objection.

LE BLANC, J. In shewing cause against this rule an objection has been taken to the action itself ; and if the action be not maintainable, it is unnecessary to enter into the other objection, which is only to the form of the declaration. And it appears to me, that the action does not lie ; for the defendant is charged with having *wrongfully, &c.* sued out the *non omittas* writ. But it does not appear to have been issued by the officer upon any false suggestion of the party suing : on the contrary, it was issued according to the regular practice of the Court, which has subsisted for a long period : and in the only instance which has been shewn of any attempt made to set aside such a writ as irregular, the Court refused the application. Therefore, when it appears that there was no false suggestion of the party to obtain the writ, and that the issuing of it was not irregular, how can we say that the party is a wrong-doer in suing out such process ? This differs the present case from those that have been cited, where a party suing out a writ may yet be a trespasser ; for he, as well as the officer who executes the writ, may be a trespasser, unless he can justify under it ; which could not be done in the case of *Barker v. Braham* and *Norwood*, because there was no judgment to warrant the taking the person of the administratrix in execution. But there was a very good reason for not bringing an action of trespass in this case, because the writ would have justified both the party who sued it out, and the officer who executed it. The plaintiff was therefore driven to the experiment of bringing an action on the case, in which however it is stated that the party *wrongfully* sued out this process : and it now appearing that the writ was sued out according to the long established practice of the Court, confirmed in the only instance in which it was attempted to be impeached for irregularity, we cannot say that the party suing it out is a wrong-doer. Rule discharged.

Scott v. Lifford(a).

[S. C. at *Nisi Prius*, Campb. 246.]

9 East 347. May 6, 1808.

Where the indorsee of a bill of exchange lodged it with his bankers, who presented it for payment on the 4th, when it was dishonoured, and on the 5th they returned it to the indorsee, who gave notice to the drawer of the dishonour on the 6th by the two-penny post: held such notice to be reasonable.

THIS was an action by the indorsee of a bill of Exchange against the drawer. It appeared that the bill had been drawn on the 1st of *March* 1806, by the defendant, on one *Moses Agar*, payable three months after date : and

(a) Ex Relatione Magi. Selwyn.

the plaintiff having become the holder of it, had placed it in the hands of his bankers, *Down and Co.* on the 4th of *June*, when the bill became due, a clerk of *Down and Co.* presented it for payment; and it was dishonoured. On the 5th they returned it to the plaintiff, who by letter, put into the two penny-post on the 6th, gave notice to the defendant of the dishonour; the plaintiff living in *London* and the defendant at *Shadwell*. The case was left to the jury on the question, whether the notice of the dishonour had been given in reasonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And on motion by *Wigley* for a new trial on the ground that due diligence had not been used;

LORD ELLENBOROUGH, C. J. said, I cannot say that the holder on the return of the bill dishonoured to him is bound, *omissis omnibus aliis negotiis*, to post off immediately with notice: if reasonable diligence has been used, it is sufficient.

GROSE, J. Whether due diligence has been used is a question of law(1); but judges may take the opinion of a jury as to what is convenient in the manner of giving notice.

LE BLANC, J. It cannot be contended that a banker ought to give notice of the dishonour to any but his customer for whom he held the bill: and I cannot rule that the holder of a bill may not avail himself of the conveyance by the two-penny post(2).

Rule refused.

Stadt v. Lill.

[S. C. at *Nisi Prius*, 1 Campb. 242.]

9 East, 343. May 6, 1808.

A guarantie in writing to pay for any goods which the vendor delivers to a third person is good within the 4th sect. of the stat. of frauds, as containing a sufficient description of the consideration of the promise, (namely, the delivery of the goods when made) as of the promise itself; both of which are included in the word *agreement* required by that section to be reduced into writing, &c.

THIS was an action on the case for the breach of a guarantie in not paying the value of goods delivered by the plaintiff to one *Nichols*. The defendant gave a written guarantie signed by him in this form: "I guarantie the payment of any goods which *J. Stadt* delivers to *J. Nichols*." It was objected at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, that this guarantie was void by the 4th sect. of the statute of frauds 29 Car. 2. c. 3, which avoids any promise to answer for the debt of another unless the *agreement* be in writing, &c.: and in *Wain v. Warlters*, 5 East, 10, recognised in *Egerton v. Matthews*, 6 East, 307, it was held that the word *agreement* included the consideration for the promise as well as the promise itself: and here there was no consideration stated for the promise. But Lord *Ellenborough* was of opinion that the stipulated delivery of the goods to *Nichols* was a consideration appearing on the face of the writing, and when the delivery took place the consideration attached; and he directed the jury accordingly; who found for the plaintiff: but he gave leave to the defendant to move to enter a nonsuit if this direction were wrong.

(1) Vide *Bateman v. Joseph*, 12 East, 433, and note 1.

(2) For *American* cases establishing the general rule as to notice, see *The Bank of North America v. Vardon*, 2 Dall. 78. *Mallory v. Kirwan*, Id. 192. *Warden & al. v. Carson's executors*, Id. 233. *The Bank of North America v. Pettit*, 4 Dal. 127. *Jackson v. Richards*, 2 Caines, 343. *Corp v. M'Comb*, 1 Johns. Ca. 328. *Tunno & al. v. Lagne*, 2 Johns. Ca. 1. *Widgery v. Munroe & al.* 6 Mass. Rep. 449. *Freeman & al. v. Boynton*, 7 Mass. Rep. 433.

The Attorney-General now moved accordingly, and stated the objection, and the cases on which it was founded.

But *the Court* were satisfied that the direction was right, for the reason before given by Lord *Ellenborough*, which his Lordship now repeated as above stated (1).

Hands v. Burton.

9 East, 349. May 6, 1808.

Proof that the defendant agreed to sell his horse warranted sound to the plaintiff for 31*l.* 10*s.* and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.* and that the difference only should be paid to the defendant, will support a count charging only that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.* the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the said 31*l.* 10*s.*

THE declaration stated, that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.* to be paid by the plaintiff to the defendant, the defendant promised that the horse was sound; and that the plaintiff did buy of the defendant the horse for that price, and did pay to the defendant the said 31*l.* 10*s.*; and then alleged as a breach that the horse was unsound. The proof, at the trial before *Graham, B.* at *Oxford*, was that the defendant agreed to dispose of his horse, which he warranted sound, to the plaintiff for 30 guineas; but agreed at the same time, that if the plaintiff would take the horse at that value, he, the defendant, would purchase of the plaintiff's brother another horse for 14 guineas, and that the difference only should be paid to the defendant. The witness described it as *one deal* between the parties, and that but for the latter consideration he did not believe that the bargain would have been made. It was therefore objected that the proof varied from the contract as laid, and shewed rather a contract for the exchange of horses, paying the difference only in money, than an entire money payment for the horse in question. The learned Judge however refused to nonsuit the plaintiff, but reserved the point; and the plaintiff recovered on proof of the unsoundness of the horse.

W. E. Taunton now moved to set aside the verdict, and enter a nonsuit, on the variance stated. But by

Lord ELLENBOROUGH, C. J. The parties agreed to consider the brother's horse as 14 guineas in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was 30 guineas, and the defendant received 30 guineas in money and value.

GROSE and LE BLANC, Justices, concurred. The latter observed that the agreement was in effect this: the plaintiff says, I will buy your (the defendant's) horse for 30 guineas, and you shall buy my brother's horse for 14 guineas, and the 14 guineas which you are to pay shall be reckoned as part of the 30 which you are to receive.

Rule refused.

(1) Vide *Leonard v. Vredenburg*, 8 Johns. 29, in point. The decision in *Wain v. Warlters* was recognised by the Supreme Court of *New-York* in *Sears v. Brinks*, 3 Johns. 210.

French v. Patton.

[S. C. at Nisi Prius, 1 Campb. 72.]

9 East, 351. May 6, 1808.

A policy of insurance originally underwritten on "*ship and outfit*" was, after the ship sailed, declared by consent of all parties, to be on "*ship and goods*," by a memorandum written on a blank space in the body of the policy; but without any new stamp: and it having been before decided that for want of the stamp the plaintiff could not recover as upon a policy on *ship and goods*, as declared by the memorandum; it was now held that he could not recover upon the policy in its original state, as an insurance on "*ship and outfit*," by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested.

THIS was another action on the same policy of insurance, on which *Hill*, as agent, before sued this defendant, and which is reported under the name of *Hill v. Patton*, 8 East, 373. The plaintiff there declared as on a policy on *ship and goods*(a); and it then appeared that the policy, which, as it stood in the printed part of it was on *ship and goods*, had been restrained by a written note in the margin to *ship and outfit*, in consequence of a misunderstanding by the broker of the instructions of his principal, in which state it was subscribed by the underwriters in September 1804; and that on a subsequent application to them by the broker made long after the sailing of the ship, they had agreed to alter it, by the following memorandum, inserted in the body(b) of the policy, upon a blank space between the printed parts; against which the underwriters wrote their initials. "It is hereby agreed that the interest in this policy of insurance shall be on *ship and goods* instead of *ship and outfit*, as originally declared. London, 13th March 1805."

The Court were of opinion in the former case, that though the alteration were agreed to by the underwriters, yet as it essentially varied the risk insured, it could not be made effectual without a new stamp; and therefore they set aside the verdict which had been obtained by the plaintiff upon proof of a total loss. And now the assured brought a new action in his own name, and declared as upon a policy on *ship and outfit*, being the form in which it was originally subscribed by the underwriters, and which remained legible in the same state as before. But Lord *Ellenborough*, C. J. was of opinion that the alteration having been made by one who had competent authority to bind his principal, though made by consent of the underwriters, avoided the policy as it was before, and therefore it could not be declared upon in its original state without a new stamp. The case now came on in the peremptory paper upon a rule obtained in a former term for setting aside the nonsuit, and having a new trial: against which

The *Attorney General* and *Garrow* were now to shew cause: but they thought the ground of the nonsuit so clear, as stated by his Lordship, that they waived adding any thing by way of argument in support of it.

Park and *Marryat*, in support of the rule, argued to this effect: There is no alteration or erasure of the original instrument, which remains as it was at first subscribed a policy of insurance on "*ship and outfit*;" and this was at one time binding on the parties. But they afterwards contemplated to vary the agreement, and to make it a policy on *ship and goods*; and this was attempted to be done, not by any spoliation of the original instrument, which

(a) The beginning of the former report inadvertently states that action to have been brought on a policy of insurance on "*ship and outfit*," instead of "*ship and goods*:" but the error is manifest both from the marginal notes, and the whole context of the report.

(b) Upon the former occasion the memorandum was said to be indorsed on the policy; but by a *fac simile* of the policy now shewn in Court, it appeared to have been made in the manner above stated.

would have raised the question whether it were thereby avoided, though done without fraud, and for a purpose which had failed; but by a distinct memorandum, bearing a different date from the original policy and therefore the same for this purpose as if made on a different piece of paper, agreeing that the policy should stand, as it originally did, (meaning in the printed part) on ship and goods. Now, either that memorandum was or was not effectual to do away the original contract between the parties and substitute a new one. This Court in the former case of *Hill v. Patton* held that it was not effectual; and could not be received in evidence without a new stamp, and therefore that the plaintiff, who had declared as upon a policy on ship and goods according to the memorandum, could not recover. It follows then that the original contract, unaffected by any legal evidence of a different contract subsequently entered into, must remain in force. The facts only shew that there was an ineffectual attempt to alter it. If the Court cannot look at the memorandum for the purpose of sustaining the original frame of the policy in its printed form neither can they look at it in order to overturn it as it stood when subscribed. A perfect contract must be substituted before a former perfect contract can be superseded. To shew that, independent of any objection arising on the stamp laws, an alteration made, *bona fide*, by consent, and in order to correct a mistake, would not vitiate a policy, they cited *Bates v. Grubham*, Salk. 444, as in point: which was supported in principle by *Motteux v. The London Assurance Company*, 1 Atk. 545. So in *Zouch v. Claye*, 2 Lev. 35. and 1 Vent. 185, the adding by consent the name of a second obligor to a bond after the execution of it by the first obligor was held not to avoid it. Lord Hale there referred to a case in *Moor*(a) as confirmatory of this doctrine; which he says had been before adjudged to the contrary in *Cro. Eliz.* 626(b). The avoiding of the instrument was part of the penalty annexed by the common law to the fraudulent alteration of it. Then in the late case of *Henfree v. Bromley*(c) this Court held, that an award, which was altered by the umpire

(a) In the report in *Levinz* the reference is to *Moor*, pl. 738, which is a misprint for pl. 1730. See also *Moor*, 835. pl. 1125. where the plaintiff sued on an obligation, which the jury found specially to have been interlined, after the execution of it by the defendant, with the words *Vicemiliti comitatus Oxon*, without the privity of the plaintiff; but they did not find by whom it was done; and because the interlining was not in a material place, nor with the privity of the plaintiff, the Court gave judgment for him: but they said that if it had been in a material place, or with his privity, *without the assent of the obligor himself*, it would have avoided the deed.

(b) This refers to the case of *Markham v. Gonaston* in Tr. 40 *Eliz. Rot.* 212. It appears by *Coke's Report* (*Cro. Eliz.* 626.) that *Markham* had brought debt in *C. B.* upon an obligation against *Fox*, who pleaded the filling up of the blank spaces in the bond after the sealing and delivery, and therefore that it was not his deed; which was held to be a good cause of avoiding the bond; wherefore issue was taken that they were not filled up after the sealing and delivery; and it being proved at *Nisi Prius* that they were so filled up, the plaintiff was nonsuited. The plaintiff then brought an action on the case, (which is the one reported in *Cro. El.* and *Moor* 547.) against the defendant *Gonaston* for having afterwards fraudulently filled up certain blanks, &c. in the bond, without the assent or notice of the plaintiff, and in order to avoid the bond: on which the plaintiff recovered judgment; the opinion of the Court as there stated being, that the bond was avoided by the material alterations made in it, though for the benefit of the obligor, and by his assent. But the report in *Moor* notes, that afterwards the plaintiff brought a new action upon the bond against *Fox*, who pleaded the special matter, and concluded that it was not his deed; to which *Markham* replied that the blanks were filled up with his assent: and on demurrer it was adjudged for the plaintiff in *B. R.* And this explains what was said by Hale in *Zouch v. Clay*, 2 Lev. 85. Lord *Ellenborough*, C. J., in this part of the argument, asked whether these cases were not all considered in *Master v. Miller*, 4 Term Rep. 320: to which no answer was given from the bar: but 18 Vin. Abr. tit. Fairs, T. & U. were referred to as collecting all the cases. It appears however upon reference to that case, that though many other authorities were mentioned, these were not; though much in aid of Mr. Justice Buller's argument, who differed from the rest of the Court.

(c) 6 East, 308, and vide *Irvine v. Elnon*, 8 East, 54.; which was also referred to as confirmatory of the other case.

after his authority had expired, though void for the increased sum directed to be paid, was yet good for the original sum awarded, which still continued legible.

LORD ELLENBOROUGH, C. J. In that case the act of the umpire in altering the award, after his authority had expired, was taken to be the same as the act of a mere stranger. But here the broker had a continuing authority to bind his principal by the alteration of the policy; and the alteration was effectual to bind all the parties if a new stamp had been affixed on the instrument. The new agreement was complete as far as the will of the parties could make it so; and it only wanted a circumstance which the law requires to give it its full legal effect. But though ineffectual as an instrument to sue on, it seems effectual to do away the former agreement which was thereby abandoned. If this were otherwise, would it not operate as a fraud on the revenue. I am glad however that this case comes before us on a nonsuit, because the plaintiff will not be concluded by our present opinion. I have turned the question in my mind again and again with great anxiety. In the first action the plaintiff insisted on the alteration as made agreeably to the real intentions of the parties, and that the policy, as it was first subscribed, was contrary to the instructions of the broker, and by mistake. But now he desires us to consider that it was not altered, because it was not effectually altered for want of a new stamp to the memorandum. But is it not made a different policy by the memorandum, by which a different contract is substituted by the act of the parties in lieu of the former one, which they abandon? Is it less effectual to shew the intention of the parties because it is a fraud in law against the revenue. The plaintiff's own act has made, as far as he can make, the policy speak a different language from what he now insists that it does, and he must take the consequences. I cannot therefore say, that the policy is not so altered as to have lost its original identity, though the circumstance of a stamp be wanting to give full effect to the instrument so altered: and I do not think that the plaintiff can recur to it again in its original state. If however he shall be advised to question our opinion, I am glad that the opportunity will still be open to him.

GROSE, J. This is an action brought upon a contract which was once perfect, till it was superseded by another contract which was also perfect, as far as the will of the parties was declared; but it could not be put in suit for want of the stamp which the law requires. Still it appears upon the face of the former contract that it has been altered and vacated, and this has been done by the act of the parties who were competent to do so. Whatever reluctance I may feel I must declare the law as it appears to me.

LE BLANC, J. We must give the rule of law in this case, as far as we are compelled to do it, with reluctance, because it is against a party who perhaps meant to do no wrong at the time: but can the Court enforce an agreement after the parties themselves have upon the very face of the same instrument declared that it is not their agreement, and have actually written another and a different agreement in the place of it. And I cannot say that it is the same thing as if the memorandum had been written on a different instrument; for it is inserted in the body of the original agreement, and makes it speak a different language. It shews an entire alteration in the minds of the contracting parties. Then finding that the substituted agreement cannot be enforced because of an objection arising upon the stamp laws, the plaintiff now wishes to resort back to that which he has declared was not his agreement. There is another reason why this should not be permitted to him, because it is against the policy of the revenue laws, for it would hold out encouragement to break these laws, and to try alterations of this sort, if after an attempt made to alter a contract without a new stamp, it should be held that though the at-

tempt were ineffectual as to the new contract of the parties, they could recur back again to the original agreement and set that up again(1).

Rule discharged.

The King v. Pearse.

9 East, 358. May 7, 1808.

Though it be proper for a magistrate in drawing up a conviction on the stat. 5 Ann. c. 14. to state the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of it in the words of the statute, yet a conviction in the latter form is valid in law; but the magistrate subjects himself to an information if he endeavor to shelter himself from detection by mis-stating such legal result when the evidence would not warrant it.

ABBOTT moved for a certiorari to bring before the Court a conviction on the stat. 5 Ann. c. 14. s. 4. drawn up according to the precedent in *Burn's Justice*, followed in the case of *The King v. Thomson*, 2 Term Rep. 18, though disapproved of by all the Court, wherein the deposition of the witness to the fact was stated in the words of the statute; namely, that the defendant on the day and place mentioned "did keep and use a certain engine called a gun, to kill and destroy the game;" without setting forth the particular evidence of the fact. The same form had been adopted before in *Rex v. Hartley*, Cald. 175, and was afterwards pursued in *Rex v. Lovet*, 7 Term Rep. 152; but in the latter case the Court greatly disapproved of it; and granted a rule calling on the conviction magistrate to shew cause why a criminal information should not go against him for not stating all the evidence given; and after hearing the affidavits on both sides the rule was finally discharged only on the ground that the magistrate had not acted corruptly, and might have been misled by the precedent in *Rex v. Thompson*: but they expressed their opinion in strong terms, that it was the duty of magistrates in all cases to state the whole of the evidence and not merely the result of it. And in *The King v. Clarke*, 8 Term Rep. 220, where the particular evidence of the fact of killing the game was set forth, the Court expressed their approbation of it; and recommended it as a precedent to be followed in future; and expressed themselves much dissatisfied with the general mode of stating the evidence, in the terms of the act of parliament, which had been practised in these cases. He therefore moved for the certiorari in this case, with a view to settle the question in future. But by

Lord ELLENBOROUGH, C. J. all the arguments against this form of conviction were discussed and considered in *The King v. Thompson*; and though the court disapproved of it, still they held themselves bound by the former precedents to support it. The point therefore having been decided again and again, we cannot have it discussed any more.

LE BLANC, J. If a magistrate endeavour to shelter himself from detection by merely stating the fact of the offence in the terms of the act of parliament, as if it were the legal effect of the evidence, when the evidence itself would not warrant the conclusion, he subjects himself to a criminal information, upon a proper case laid before the Court.

Per Curiam,

The writ denied.

(1) Vide *Cole & al. v. Parkin*, 12 East, 471.

Derby Canal Company v. Wilmot, Bart.

9 East, 360. May 7, 1808.

Though the affixing the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser.

IN ejectment for lands in the county of *Derby*, Sir *Robert Wilmot*, the defendant, claimed by conveyance from the company, which is incorporated by act of parliament, under their seal. It appeared at the trial at *Derby*, that the defendant had purchased the land in question from the company, to whom he had sold other land, and there were accounts subsisting between them which were not settled. That upon the occasion when the company's seal was affixed to the conveyance in question, their managing committee (which had authority for this purpose) was sitting at an inn in the town, and the conveyance having been brought to them, they directed their clerk to affix the seal to it, but not to part with it till the accounts were adjusted; the company's clerk accordingly sent his clerk with the conveyance to the house where the seal was usually kept in the town, in order to affix the seal to the instrument, but with a direction not to part with it, but bring it back to him; which was done accordingly. *Wood, B.* thought that the conveyance under these circumstances was not complete to pass the legal estate, and therefore the plaintiffs recovered a verdict; which

Vaughan, Serjeant, now moved to set aside, upon the authority of 2 Rol. Abr. 23. l. 50, which cites the case of the Dean and Chapter of *Fernes*, Dav. Rep. 44. b. that the deed of a corporation needs no delivery, but the affixing of the common seal gives it perfection without delivery. But

Lord ELLENBOROUGH, C. J. answered, that the rest of the *Court* agreed, that in order to give it effect, the affixing of the seal must be done with intent to pass the estate; otherwise it operates no more than a feoffment would do without livery of seisin: whereas here, though the seal was directed to be and was affixed to the instrument for form, yet it was without a reservation of any present effect to pass the title out of the company, as they did not choose to deliver over the possession of the conveyance till the accounts were settled between them and the purchaser(1).

Purcell v. Macnamara.

[S. C. at *Nisi Prius*, 1 Campb. 199.]

9 East, 361. May 7, 1808.

It lies on the plaintiff in an action for a malicious prosecution to give evidence of malice in the defendant, either express, or to be collected from circumstances shewing plainly the want of probable cause; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called.

AT the second(a) trial of this cause, which was an action for a malicious prosecution against the defendant for having indicted the plaintiff of perjury; assigning the perjury on an affidavit made by the plaintiff swearing to the words uttered by the defendant; the proof on the part of the plaintiff in addition to the formal proof of the record of acquittal was, that after the indictment found was ready for trial, the prosecutor (the present defend-

(1) [See *Willis v. Jermin*, Cro. Eliz. 167. *Clark v. Woollen Co.*, 15 Wend. 256—W.]

(a) See the Report, ante 167, on the first trial.

ant) was called and did not appear; on which the verdict of acquittal passed: without proceeding to give any further evidence of malice than what, it was contended, arose from the absence of any proof of probable cause. But Lord *Ellenborough*, C. J. who tried the cause, thought that this was not sufficient to support the action, without evidence of express malice, or at least of circumstances evincing such entire want of probable cause from whence malice was to be presumed: and therefore he nonsuited the plaintiff.

Gurney now moved to set aside the nonsuit; and admitted that the doctrine laid down by his Lordship was supported by the authority of *Savil v. Roberts*, Salk. 13. 1 Lord Ray. 374. 5 Mod. 410. 12 Mod. 211.: but this, he said, had been overruled in the case of *Parrot v. Fishwick*, (a) London sittings after *Trinity Term 1772*, mentioned in Bull. N. P. 14, in which it is stated to have been ruled, that "where the facts lie in the knowledge of the defendant himself, he must shew a probable cause, though the indictment be found by the Grand Jury; or the plaintiff shall recover without proving express malice." And here he contended, that the fact on which the perjury was assigned, namely, the words sworn to have been uttered by the defendant, being necessarily a fact within his own knowledge, might, if not true, have been disapproved by him on the prosecution of the indictment. [Lord *Ellenborough*, C. J. The rule by which I was governed does not stand upon the authority of *Savil v. Roberts* alone: the same point was ruled by Lord *Kenyon* in *Sykes v. Dunbar* (b), that it was not sufficient for the plaintiff to shew his acquittal in order to sustain the action, without going further and giving evidence of malice in the defendant.] In that case, *Dunbar* was the only witness upon the indictment; but here there were other witnesses besides the prosecutor on the indictment.

LORD ELLENBOROUGH C. J. The question comes in fact to this, whether proving an acquittal for want of prosecution be *prima facie* evidence of malice to support an action for a malicious prosecution: the contrary of which has been always held. The want of probable cause may indeed be so strong and plain as to amount to evidence of malice; but that must be shewn by the plaintiff.

GROSE, J. It is necessary for the plaintiff to give evidence of malice in the defendant, in order to support the action.

LE BLANC, J. An action for a malicious prosecution cannot from the very nature of it be maintained without proof of malice, either express or implied: and malice may be implied from the want of probable cause: but that must be shewn by the plaintiff.

Rule refused(1).

(a) The generality of the position laid down in the printed note of the case is scarcely warranted by the MS. note of the case, from whence it was probably taken; which was this. *Parrot v. Fishwick*, London sittings after Trin. 1772. "In an action for a malicious prosecution in preferring and prosecuting an indictment for perjury, where the bill of indictment was found, and the plaintiff acquitted by verdict; Lord *Mansfield*, in summing up, said, it was not necessary to prove express malice; for if it appeared that there was no probable cause, that was sufficient to prove an implied malice, which was all that was necessary to be proved to support this action. For in this case all the facts lay in the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power and incumbent on him to prove it. Verdict for the plaintiff 50*l*. A marginal note adds, that "the indictment was for perjury committed on the trial of an action for use and occupation brought by the defendant against the plaintiff's master."

It is quite consistent with this summing up, that the plaintiff should have given *prima facie* evidence at least of the want of probable cause, from whence if unexplained, malice might be collected.

(b) Sittings after *Michaelmas Term*, 40 Geo. 3.

(1) Vide additions by the present editor to Harg. & Butl. Co. Litt. 161. a. note 4. sect. 4. (Phil. edit.)

Weller v. Toke.

9 East 364. May 7, 1808.

One magistrate committing the mother of a bastard to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 G. 2 c. 44. though by the stat. 18 Eliz. c. 3. s. 2. jurisdiction over the subject matter is committed to two magistrates.

THE defendant, a justice of peace for the county of *Kent*, being sued in an action of trespass and false imprisonment, for having, without the concurrence of any other magistrate, committed the plaintiff to custody for not filiating her bastard child upon a summons to appear before himself; from which imprisonment she was afterwards discharged by his order; it was objected at the trial at *Maidstone*, before the Chief Baron, that the transaction had taken place twelve months before the action brought, and that no previous notice of the action had been given, as required by the stat 24 Geo. 2. c. 44.: on which the plaintiff was nonsuited.

Garrow now moved to set aside the nonsuit, on the ground that the defendant, having acted wholly without jurisdiction in assuming to himself authority to commit the mother for not filiating a bastard child, when the statute 18 Eliz. c. 3. s. 2. only gives jurisdiction in such matters to two justices of peace, which must be exercised by them together(a), was not entitled to the notice required by the statute; inasmuch as the act could not be said to have been done in the execution of his office; and the statute only intended to protect magistrates acting irregularly or erroneously in cases where they had jurisdiction in themselves of the subject matter. And he cited *Alcock v. Andrews*(b), where Lord *Kenyon* is said to have taken the distinction between a constable acting *colore officii*, and *virtute officii*: that he was not protected by the statute in acting *colore officii*, where his office gave him no authority to do the act; but only when acting within the limits of his official authority, he exercised that authority improperly, or abused the discretion placed in him.

Lord ELLENBOROUGH, C. J. It is not denied that the defendant had authority to act as a magistrate upon the subject matter of the complaint brought before him, though he could not act alone. Though the act of commitment, therefore, cannot be said to have been done by virtue of his office, yet the subject matter was within his jurisdiction, and he intended to act as a magistrate at the time, however mistakenly. The very object of the legislature in requiring the notice to be given was to enable the magistrate to tender amends as for the wrong done, contemplating him as a wrong-doer. If this had been an act wholly aliene to his jurisdiction, I should have said that he acted without the protection of the law(1).

Per Curiam,

Rule refused(c).

(a) *Billings v. Prinn and another*, 2 Blac. Rep. 1017.

(b) *Sittings after Michalemas Term 1788*. 2 Esp. Ni. Pri. Cas. 542.

(1) Vide *Sabin v. De Burgh & al.* 2 Campb. 196, and the reporter's note, p. 199.

(c) Vide *Milton v. Green*, 5 East, 233.

Denn, on the Demise of James Wilkins v. Kemeys and Another.

9 East, 366. May 10, 1808.

Under a devise to *A.* for life, remainder to *B.* and her heirs; but if *B.* die before *A.*, or if she die without heirs of her body, then to *C.* and his heirs, &c. held that the devise over to *C.* after *B.* could only take effect if *B.* died before *A.* and without issue; for that unless or were read as and, the devise over would take if *B.* died before *A.*, although *B.* left issue; which would clearly be against the apparent intent of the deviser, which was to prefer the issue of *B.* to *C.* It seems, that *freehold* may pass by a will giving the estate a local description and name, though it be mistakenly called *leasehold*; there being no other property answering to the name and description.

AT the trial of this ejectment for a messuage, stable, coach-house, garden, orchard, and two acres of land in *Tiddenham*, in the county of *Gloucester*, a verdict was taken for the plaintiff, subject to the opinion of this court on the following case.

William Philpot being seised in fee of the premises in question, by indenture of feoffment of 29th April 1641, conveyed the same to *William Jones* in fee. *William Jones*, by indenture of the 25th September 1678, between him and *Ann* his wife, of the one part, and *William Wilkins* (the great grandfather of the lessor of the plaintiff) of the other part, in consideration of 16*l.* demised the premises to *W. Wilkins* his executors, &c. for 999 years: and by indenture of release of the 26th September 1678, gave, granted, remised and released, and for ever quitted claim to *W. Wilkins*, in "his possession being, and to his heirs and assigns for ever, all the estate, right, title, interest, claim, and demand whatsoever which he the said *William Jones* then had, or ever had, or which his heirs, executors, administrators, or assigns, at any time or times hereafter should or might or could have or claim of in or to the said premises; to hold unto the said *W. Wilkins* his heirs and assigns, to the only proper use and behoof of him the said *W. Wilkins* his heirs and assigns for ever," with general releases, and warranty. The last deed was duly executed and attested by the same subscribing witnesses as attested the execution of the next preceding deed. *W. Wilkins* occupied the premises, and died possessed thereof in 1736, leaving his widow *Catherine* in possession, and leaving a son *Joseph*, and three daughters, *Ann*, *Sarah*, and *Eleanor*. By indenture of March 19th, 1728, between *W. Wilkins* and *Catherine* his wife, of the first part, and *Ann Anderson* of the second part; reciting the deed of the 25th of September 1678; *W. Wilkins* and *Catherine* his wife did grant, bargain, sell, assign, and set over, the premises to *Ann Anderson* for the residue of the term of 999 years created by the deed of the 25th of September 1678, as a security for the repayment of 25*l.* and interest: with a proviso that if *Wilkins* and his wife, or their or either of their heirs, executors, &c. should pay to *Anderson*, her executors, &c. the principal and interest on the 17th of September then next, the indenture should be void. By indenture of the 19th of September 1732 between the same parties, the premises were further conveyed to *Anderson* for securing a further sum of 5*l.*, with a like proviso on payment of 30*l.* on the 18th of March then next. By indenture of the 30th of September 1736, between *Catherine Wilkins* of the one part, and the said *Joseph Wilkins* of the other part, *Catherine*, in consideration of 5*s.* bargained and sold the messuage with one piece of ground, then in her possession, containing by estimation about one acre, in *Teddenham*, &c. to *Joseph Wilkins* in fee(a). *Catherine*

(a) It was admitted, that this deed of the 30th of September 1736 operated nothing in respect of the case in judgment; *Joseph Wilkins* having had the fee by descent before, subject only to the dower of *Catherine* his mother.

died in 1740 in possession of the premises, leaving *Joseph Wilkins*, the eldest son and heir at law of the said *William* and *Catherine*, and their three daughters, *Ann*, *Sarah*, and *Eleanor*, her surviving. *Joseph Wilkins* afterwards died leaving one only son, *John*, mentioned in the will of *Ann Jones* hereafter stated; which *John* died in 1788, leaving the lessor of the plaintiff his only son. On the death of *Catherine Wilkins* in 1740, her daughter, *Ann*, entered upon the premises and kept possession adversely against her brother *Joseph* until her death, without issue, in 1779. *Ann* married *Reece Jones*, who by his will, dated 12th January 1763, bequeathed to his said wife *Ann*, whom he appointed executrix, all his real and personal estate; and soon afterwards died; and on 16th June 1768, she proved his will at *Gloucester*. By indenture of the 28th of Feb. 1770, between *Selwin James*, sole executor of the said *Ann Anderson* widow, of the one part, and the said *Ann Jones*, widow, devisee and sole executrix of *Reece Jones* of the other part; reciting the abstracted indentures of mortgage or assignment of the 18th of March 1728, and 19th of September 1732, and that default was made in payment of the principal sum of 30*l.* and interest there mentioned, and that there was due to *Ann Anderson* 50*l.* for principal and interest, which *Reece Jones* in his life time had paid to her; but that no assignment was ever made by her of her estate and interest in the premises by virtue of those indentures to *Reece Jones*; and that *Ann Jones*, being entitled under his said will to take an assignment thereof, had requested *James*, in whom such term estate and interest was then vested, as executor of *Ann Anderson*, to assign the same to her, *Ann Jones*, which he had consented to do; *James* therefore assigned the premises to *Ann Jones* her executors, &c. for the residue of the said term of 999 years. *Ann Jones*, by her will of the 11th of September 1771, duly executed and attested to pass real estate, devised as follows: "I give and bequeath unto *Thomas Cooper* for life, all my leasehold estate situated on *Tutshill*, commonly called the *Star*, consisting of one dwelling house and stable, one piece of meadow, orchard, and garden. I also give unto the said *T. Cooper* all my household goods, beds, &c. and all utensils of brewing, and other my goods and chattels, moveable and unmoveable, together with all such sums of money as may be due to me, at the time of my decease. And after his decease I give and bequeath unto *Jane Prickett* all the above leasehold estate, with all such furniture as shall remain after *T. Cooper's* decease, to her and to her heirs and assigns for ever. But if *Jane Prickett* die before *T. Cooper*, or if she die without heirs from her body lawfully begotten, then I will my leasehold estate only unto *John Wilkins*, son of *Joseph Wilkins*, to him his heirs and assigns for ever. But if *John Wilkins* die before he comes to lawful possession of it, or die without issue of his body lawfully begotten, I will it descend unto *S. Tovey*, his heirs and assigns for ever. And after the decease of *Tho. Cooper* and *Jane Prickett*, and on the accession of *John Wilkins* to my leasehold estate, that my household goods shall be equally divided between *Catherine* and *Martha Tovey*." And she appointed *Tho. Cooper* her executor; who after her death duly proved the will, and took possession of the premises in question. The premises described in the said will as leasehold are those now in question. *Jane Prickett* married *James Williams*; and by indenture dated 20th of August 1768, *Cooper* demised the premises to *Williams* and his wife for 21 years, if he, *Cooper*, should so long live at the yearly rent of eleven guineas. By indenture tripartite of the 10th of March 1789, between *Thomas Cooper* administrator with the will annexed of *Ann Jones*, of the first part, *James Williams* and *Jane* his wife, formerly *Jane Prickett* of the second part, and *J. Seys* of the third part; reciting the indenture of the 28th of February 1770, therein taking notice of the indenture of mortgage of the 19th of March 1768, in which are recited the indentures of the 25th of September 1768 and 19th of September 1732, and the other matters therein recited; and reciting the death of *Ann Jones*, and her said will, and the said

indenture of lease dated the 20th of *August* then last past : and that *James Williams* and *Jane* his wife having occasion borrow 40*l.* *John Seys* had agreed to lend the same, with the approbation of *T. Cooper*, upon mortgage of the said abstracted premises : *Cooper, Williams* and wife, did thereby grant, bargain, sell, and assign to *Seys* all the said premises, and all the estate, &c. to hold to *Seys* his executors, &c. for the residue of the said term of 999 years, subject to a proviso that on repayment of the 40*l.* with interest on the 10th of *September* then next, *J. Seys*, his executors, &c. would surrender or assign so much of the said term as should be unexpired to *Williams* and wife, their executors, &c. The 40*l.* mortgage money not being paid, *Williams* and wife by indenture of the 20th of *February* 1790, reciting the last abstracted deed, in consideration thereof, and of a further sum then paid to them, making in the whole 100*l.*, assigned the said premises to *Seys* for the residue of the term absolutely; and without any proviso for redemption, subject to the payment of the rent of eleven guineas a year to *Cooper* reserved in the lease of the 20th of *August* 1788. *J. Seys* took possession of the premises, and considerably improved them; and from him the term was regularly, by indenture of the 25th of *March* 1795 (reciting the indenture of the 25th of *September* 1678, and the other matters before mentioned,) assigned to *S. Stephens*, who, on the 2d of *July* 1797, made the defendants his executors, and died, and they are now in possession. *Tho. Cooper* died in 1791; and *Jane Prickett* died, without issue, in 1793. *James Wilkins*, the lessor of the plaintiff, is the eldest son and heir of *John Wilkins*, the devisee named in the will of *Ann Jones*, and is also the heir at law of *William Wilkins* the grantee in the indentures of the 25th and 26th of *September* 1678, and of *Ann Jones* the testatrix. The release of the 26th of *September* 1678, and the deed of the 30th of *September* 1736 were produced by the lessor of the plaintiff. The other conveyances stated were in the possession of and produced by the defendants. If the Court were of opinion that the lessor of the plaintiff was entitled to recover the premises in question, the verdict was to stand : otherwise a nonsuit was to be entered.

This case first came on to be argued in the last term, when it was ordered to be amended; and afterwards in the same term it was argued by *Wigley* for the plaintiff, and *Gaselee* for the defendant, when several point were made :

1st, Whether the mortgage term of 999 years, created by the indenture of lease of the 26th of *September* 1678, were merged in the fee granted to *W. Wilkins* by the indenture of release of the 26th of *September* against which *Shep. Touch.* 324, was cited. 2dly, If merged, whether the old term were not revived and assigned by the deed of the 18th of *March* 1728, noticing it as an existing term, and conveying it as such from *W. Wilkins* and *Catherine* his wife to *Ann Anderson*, as a mortgage security : or whether the words "grant, bargain, sell, assign, and set over," though purporting to be an assignment of the old term, would not, if that merged, operate as a new grant or recreation of the term, by reference to the former, for the residue of the years to come : and this seemed to be conceded. 3dly, Whether upon the death of *Catherine* the survivor of *W. Wilkins* in 1740, and the rightful fee having at all events descended to *Joseph* the eldest son and heir at law of *Catherine Wilkins*; his sister *Ann*, who then entered and kept possession adversely against her brother until her death without issue in 1779, did not thereby acquire a tortious fee by disseisin, (as in *Lit. s. 411.*) notwithstanding the existence of the outstanding mortgage term to *Ann Anderson* to whom *Ann Wilkins* continued to pay the interest on the mortgage, and therefore, it was said, must be taken to have continued in possession with the assent of the mortgagee, and during which term the brother could not have recovered in ejectment. 4thly, Whether if she did acquire such tortious fee by disseisin in 1740, the assignment of the outstanding mortgage term to her (then called *Ann Jones*) in 1770 by *Schroyn James*, the executor of *Ann Anderson* the mortgagee, did

not merge the term in the fee; as the term and the fee could not, it was argued, exist together in the same person in their own right. And in Co. Lit. 388. b. it is said, that a man cannot have a term for years in his own right, and a freehold in *auter droit*, to consist together; but he may have a freehold in his own right and a term in *auter droit*. Or, 5thly, whether a rightful term could merge in a wrongful fee. Or, 6thly, whether *Ann Jones* having a rightful and a wrongful title to the possession, she might not have elected to hold, and may therefore now be presumed to have held, by her rightful title; more especially as by her will she describes the premises as leasehold, which was according to her right in them.

But ultimately it became unnecessary to decide these points; for the case was resolved into this; either the estate in *Ann Jones* at the time of her death was leasehold or freehold. If leasehold, it was agreed that the defendants were entitled, claiming under those who were competent to convey it as such. If freehold, the question turned on the devise over in the will of *Ann Jones* to *John Wilkins* (the father of the lessor of the plaintiff) if *Jane Prickett* died before *Thomas Cooper* (the first taker for life under *Ann Jones*' will,) or if she died *without heirs of her body*. And *Jane Prickett* having died without issue in 1793, but having survived *Thomas Cooper*, who died in 1791, the principal question was whether that devise over took effect; and which depended upon another question, whether the word *or* were to be read *and*: in other words, whether both the events, of *Jane Prickett* dying before *Tho. Cooper*, and of her dying without issue, must happen before the remainder over to *John Wilkins* could vest? In respect to which *Lawrence, J.* in the last term referred to *Fairfield v. Morgan*, 2 New Rep. 38, in the House of Lords, where, in a devise nearly similar, *or* was read *and*, and where all the cases on the subject are collected.

Wigley for the lessor of the plaintiff, (assuming for the purpose of the argument, that the old mortgage term for 999 years, created by the deed of demise of the 29th of September 1678, was merged in the fee released to *Wm. Wilkins* by the indenture of the 26th of September: or if it were revived, or a new mortgage term created by the deed of the 18th of March 1728 for the benefit of *Ann Anderson* the mortgagee, that upon the assignment of it by her personal representative in 1770 to *Ann Jones*, who had then acquired a tortious fee by disseisin of her brother 30 years before, that term was again merged, and therefore that at the time of *Ann Jones*' making her will she was seised in fee of the premises unincumbered by any outstanding term;) contended, 1st, that though the premises were described in the will as *leasehold*, yet the devisor having nothing but this *freehold* estate which is locally described, they would pass under this mistaken description; rejecting the word *leasehold* as surplusage; according to the rule in *Knotsford v. Gardiner*, 2 Atk. 450. 2dly, That the word *or*, in the devise over to *John Wilkins*, was to be read in its proper disjunctive signification; and that one of the events having happened, namely, the dying of *Jane Prickett* without issue, the devise over took effect. The case of *Fairfield v. Morgan* was a devise to the testator's brother of all his real and freehold estates: but in case his brother "should die before he attained the age of 21 years, or without issue living at his death," then to his mother in fee. And he endeavoured to distinguish the present from that case by saying, that here there was an apparent intent that neither of the devisees, *Jane Prickett*, or *John Wilkins*, should take any fee absolutely in the premises until they respectively came into possession. The only reason against such a construction is founded upon the supposition of an absurdity in supposing that the testatrix could intend that if *Jane Prickett* died before *Cooper*, leaving issue, such issue should not take, but the estate go over to *John Wilkins* on *Cooper's* death: but there is nothing so absurd in such an intention as to render it impossible to suppose that it could exist, though the natural sense of the words used best convey such a meaning. A devisor,

may well intend to give an estate in remainder to one relation, and if she lived to come into possession of it, then that her family, if she had any, should also have the benefit of it; but that if she never came into the possession at all, that it should go over altogether to another relation who was the next more immediate object of personal regard. But admitting some inconvenience in this construction, the reading *and* for *or* will not get rid of every inconvenience; for then if *Jane Prickett* survived *Cooper*, but without having issue, (for in case of issue, it might be a question whether she would take more than an estate tail), she might have sold the estate, and deprived the devisees over of their succession, which was clearly against the intention of the testatrix.

The Court now thought it unnecessary to hear *Gaselee* contra, on this part of the case.

LORD ELLENBOROUGH, C. J. This case is governed by that of *Fairfield v. Morgan*, and the word *or* must be read copulatively, as *and*; the apparent intention of the testatrix being, that both the events, of *Jane Prickett's* dying before *Thomas Cooper*, and of her dying without issue, should concur, before the devise over took effect: and both did not concur; for she survived *Cooper*. Taking this, therefore, either as freehold or leasehold property in the testatrix, the plaintiff is not entitled to recover. As leasehold, there was a resuscitation of a term, by the words *grant, bargain, and sell*, as well as *assign*, in the mortgage deed of *March 1723*, to *Ann Anderson*, which term afterwards came by assignment to *Ann Jones*, through whom a regular title is traced to the defendants. As freehold, considering *Ann Jones* to have acquired a tortious fee by an adverse possession since 1740, the title is out of the lessor of the plaintiff: and the devise over to his father in the will of *Ann Jones* never took effect.

GROSE, J. concurred in both views of the case; and added, that it was necessary to read *and* for *or*, in order to give effect to the intention of the testatrix; for otherwise, if *Jane Prickett* had died before *Cooper*, leaving issue, the estate would have gone over against the manifest intent of the testatrix.

LE BLANC, J. The property to be recovered in this ejectment is either freehold or leasehold: if leasehold, it is admitted that the lessor of the plaintiff cannot take it. If freehold, then he claims it as heir at law to *John Wilkins*, the devisee over in the will of *Ann Jones*. Taking it then to be freehold, though called leasehold in the will, and that as freehold it would still pass, being described by its local name and parts, the testatrix first gives it to *Thomas Cooper* for life; and after his decease to *Jane Prickett* and her heirs and assigns; but if she die before *Cooper*, or if she die without heirs of her body, then to *Wilkins* and his heirs. If this devise over has taken effect in the event which has happened, then the lessor is entitled to recover. That depends on the construction of the word *or* in that clause; whether it is to be read disjunctively, or conjunctively, as if the word *and* had been there written; because as *Jane Prickett* survived *Cooper* and died without issue, if the estate were intended to go over on the happening of either alternative, it would still go over to *Wilkins*. But there has been a long train of decisions, ending with the late case of *Fairfield v. Morgan*, and particularly *Sowell v. Garret*, (Moor 422,) which is very like the present, where the Court have construed *or* as *and*; because otherwise, if the prior devisee had issue, and died, as in *Sowell v. Garret*, before 21; or, as in this case, before *T. Cooper*, the issue, which was the object of the devisor's bounty before the devisee over, would not take at all: and therefore, to prevent so monstrous an absurdity, as that, if *Jane Prickett* died the day before *T. Cooper*, the intention of the devisor in favour of her children would be defeated, the word *or* must be read *and*.

BAYLEY, J. agreed, that the word *or* must be read *and*, in order to effectuate the manifest intention of the devisor. The first object of her bounty, after *T. Cooper*, to whom she only gave an estate for life, was *Jane Prickett*. If

she survived *Cooper*, so as to live to occupy the property herself, the testatrix meant she should have the fee: but if she died in *Cooper's* life time, in which case she could not occupy herself, but left children, the testatrix meant she should have the means of providing for those children, and therefore that in that event also she should have a fee. The devise over, therefore, was not to take effect in either event, if she lived to enjoy it herself, or if she left children to be provided for: whereas according to the plaintiff's construction, had she died before *T. Cooper*, leaving issue, the estate would have gone over to the remainder-man, without leaving her the means of providing for her children out of it; which was clearly contrary to what the testatrix intended(1).

Ker v. Osborne.

9 East, 378. May 10, 1808.

Where money in litigation between two parties, has by mutual consent been paid over to a trustee, in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to waive all objections to form.

ASSUMPSIT for money had and received, and on the other common money counts, and also on a special count, which stated that the plaintiff insured the defendant's freight of the ship *George* on a voyage from *Riga* to *London*, &c. for 150*l.*: that the ship being detained at *Riga*, under the *Russian* embargo, the defendant gave notice of abandonment to the insurers on the freight, and claimed a total loss: whereupon, in consideration that the plaintiff accepted the abandonment, and agreed to pay a total loss upon receiving an assignment of the freight, the defendant promised to assign the freight for the benefit of the insurers thereof. It then stated that the plaintiff paid a total loss to the defendant; that the embargo was afterwards withdrawn, the cargo reloaded, the voyage performed, and the freight paid by the consignees: and then assigned as a breach, that the defendant *before* he abandoned the freight to the plaintiff, had abandoned the ship to other underwriters on the ship, and afterwards assigned the ship to trustees as to 7-8ths in trust for the underwriters on ship, and as to the other 8th in trust for himself; whereby the trustees became entitled to the freight, and the defendant, though demanded, refused to assign, and became incapable of making any effectual assignment of it to the plaintiff. In another special count the breach was laid to be, that the defendant caused the freight to be payable and paid to other persons, and not to the underwriters on freight; and refused to assign and was incapable of effectually assigning the same to them. On the trial of the cause at the sittings in *London*, a verdict was taken for the plaintiff for 150*l.* subject to the opinion of the Court on a case, the substance of which, so far as respects the only point on which any opinion was given, is as follows:

The defendant, owner of the ship *George*, on the 28th of *June* 1800, chartered the ship by writing (not under seal, to *Roberts and Co.* of *London*, on a voyage to *Riga*, and back again, at a certain rate of freight per lading. On the 8th of *July*, the defendant insured the ship on the voyage out and home for 6000*l.*; and on the 16th of *July*, he insured the freight on the same

(1) Vide *Sowell v. Garret*, Moore 422. S. C. by the name of *Soules v. Gerrard*, Cro. Eliz. 525. *Price v. Hunt*, Pollexf. 645. *Barker v. Suretees*, 2 Stra. 1175. *Walsh v. Peterson*, 3 Atk. 193. *Frammingham v. Brand*, 1 Wils. 140. *Wright v. Kemp*, 3 Term Rep. 470. *Fairfield v. Morgan*, 2 New Rep. 88. *Brewer & ux. v. Opie*, 1 Call. 212. *Hauer's lessee v. Sheetz*, 2 Binn. 522. *Jackson d. Burhans, v. Blanshan*, 6 Johns. 54, where the same construction was adopted.

voyage for 2500*l.* of which 150*l.* was underwritten by the plaintiff. The ship sailed on the voyage and arrived at *Riga*, and was there detained under an embargo, after the greater part of her cargo was on board, which was afterwards unshipped. On the 24th of *February* 1801, the defendant gave written notice of abandonment of the ship to the underwriters on ship, and demanded a total loss : and they accepted the abandonment, and by a memorandum on the policy, dated the 27th of *February*, agreed to pay a total loss, "on receiving from the owner an assignment of 7-8ths of the ship," &c. which was equivalent to 7000*l.* the sum insured on her, to be paid on the first of *April*, by a bill at two months. On the 25th of *February*, the defendant gave written notice of abandonment of the freight to the underwriters on freight, and demanded a total loss ; which they agreed to pay in like manner, by a memorandum on the freight policy dated the 27th of *February*, "upon receiving from the owners an assignment of the said freight." The plaintiff accordingly paid the amount of his subscription to the defendant. On the 21st of *March* 1801, the defendant executed an assignment, by which he conveyed to *Broadley* and *Moxon* all his property, interest, and claims in and to the ship in trust, as to 7-8ths for the underwriters on ship, at their request, and as to the other 8th for himself. And on the same day he executed to the same trustees an assignment of all his right, title, interest, and claims, legal and equitable, in and to the freight from *Riga*, &c. in trust for the underwriters on freight, with their privity and consent. But it did not appear which of these assignments was first executed. The underwriters on ship also paid the defendant as for a total loss. In *May* 1801, the ship was liberated, the cargo reloaded and completed, and she returned home with and delivered the goods to the several consignees, who afterwards paid their full freight to *Moxon*, one of the trustees of the ship and freight, who still retains the same ; *which payment was made to Moxon with the concurrence of each set of underwriters.* The plaintiff at the time when he paid his subscription to the defendant knew that the defendant had abandoned the ship to the underwriters on ship, and that he had assigned the ship to *Broadley* and *Moxon*, in trust as before mentioned ; but it was not proved that he knew these facts at the time when he accepted the abandonment of the freight, and when the memorandum before-mentioned was made on the policy on freight. The parties agreed to take no advantage of form on either side, but to rest on the merits of their cases. The question was, whether the plaintiff were entitled to recover ?

Richardson for the plaintiff, having stated the facts of the case, was asked by Lord *Ellenborough*, how, after the two parties had agreed that the money in dispute should be paid over to third persons, stakeholders, the plaintiff could sue for and recover it against the defendant, who had so paid it over with his consent. This, his Lordship said, was a pre liminary objection which appeared to be fatal to the action ; and which precluded any discussion upon the merits of the case : and that the agreement of the parties to rest on the merits, and take no advantage of form, could not alter the case or bind the Court to give judgment on the merits, when there appeared to be a clear objection to the action itself. To this *Richardson* submitted, that though this was a decisive objection to the count for money had and received, yet it was none to the special count, which went upon a breach of contract, in not paying the freight over to the underwriters.

LE BLANC, J. The special count is also against you ; for the refusal to assign the freight, as there alleged, is answered by the fact of its being assigned and afterwards paid to another with the plaintiff's consent.

LORD ELLENBOROUGH, C. J. The question of right to the freight, upon the abandonment, between the underwriters on ship, and those on freight, cannot be decided in this action. It is a question of great importance and very proper for discussion when it comes before us unfettered by any preliminary objection. Perhaps it may be contended in the present instance that the

assured is liable upon his engagement to both sets of underwriters. But the subject of this suit has by agreement of all parties been taken from the defendant and deposited in other hands: in those hands therefore it must be litigated. The breach of the contract complained of by the plaintiff is the non-assignment or non-payment to him of the freight; but if he agreed that it should be assigned or paid over to another, how can he complain of the breach of that contract. He must proceed against the stakeholder.

BAYLEY, J. The money was paid over by consent of all parties, and with knowledge of all the facts. No new fact is stated, which was kept back at the time from the knowledge of the underwriters. How then can the plaintiff now object to the payment over?

Per Curiam,

Holroyd was to have argued for the defendant.

Postea to the defendant.

Doe on the Demise of Christiana Ellis v. Ellis.

9 East 382. May 10, 1808.

Under a devise of land to the testator's son *Joseph* his heirs and assigns for ever; but in case his son should die without issue, then to go to the child of which his second wife was ensient; held that *Joseph* took an estate tail.

IN ejectment for a messuage in *Leeds*, a verdict was taken, at the trial at *York*, for the plaintiff, subject to the following case. *Jacob Ellis*, being seised in fee (*inter alia*) of the premises in question, by his will duly executed, dated the 26th of *March* 1804, devised thus: "I give and devise unto my son *Joseph*, "his heirs and assigns for ever, all that messuage or tenement in *Leeds* in "his own occupation: but in case my said son *Joseph* shall die without issue, "then I give and devise the same messuage unto the child or children with "which my wife is now ensient, his or her heirs and assigns for ever." A copy of the will was annexed to the case; but no other part of it was considered to be material to the question.

The testator had two wives; by his first he had his son *Joseph*; by his second he had *Christiana* the lessor of the plaintiff, with whom his second wife was ensient at the time of making his will. *Joseph* the son survived the testator, and entered into the premises, and died; leaving *Jacob* his son and heir him surviving; who entered and died without issue; leaving *Joseph Ellis*, his paternal great uncle, his heir at law; who claims the premises, and defends the ejectment, in the name of *Mary Ellis* the tenant. *Christiana*, the daughter of the testator by his second wife, claims the premises under the above devise. The question was whether she were entitled to recover? if she were, the verdict was to stand; if not, a verdict was to be entered for the defendant.

Littledale for the plaintiff contended that *Joseph* the son, to whom and his heirs and assigns the estate was given, only took an estate tail by force of the subsequent words in the limitation over, "in case my said son *Joseph* "shall die without issue, which restrained the word, "heirs" to heirs "of the body." Therefore, on the death of *Joseph's* son. *Jacob*, without issue, the limitation over to the lessor of the plaintiff, *Joseph's* sister of the half blood, took effect. And he referred to *Parker v. Thacker*, 3 Lev. 70, *Webb v. Herring*, Cro. J. 415, *Nottingham v. Jennings*, 1 Pr. Wms. 23, *Tyte v. Willis*, Cas. Temp. Talb. 1, *Lewis v. Waters*, 6 East, 336, (in addition to which Lord *Ellenborough* mentioned *Brice v. Smith*, as reported in *Willes* 1.) and particularly to *Roe d. Scott v. Smart(a)*, as being directly in point to the present case. The testator there devised different lands to each of his sons, *James*, *John*, and

(a) C. B. Easter, 27 G. 3, reported in the last edition of *Fearne's Exec. Dev.* 203, edited by Mr. *Powell*.

Thomas, to hold to each, his "*heirs and assigns for ever*;" and if either of his three sons should die *without issue of his or their bodies*, then the estate or estates of such sons to go to the survivors or survivor; and if all his sons should die without issue, then to his four daughters and their heirs and assigns for ever. The three sons survived the testator and entered, and *John* died afterwards unmarried: and held that *Thomas* took an estate tail, which descended to his daughter; and on her death, without issue, the estate went over to *James*, and not to the heirs of the daughter to whom *James* was only related of the half-blood.

Holroyd, contra, contended that the limitation to *Joseph* and his heirs, and in case he die without issue then over, gave *Joseph* a fee determinable on a particular event; not on an unlimited failure of issue, but on his dying without issue at the time of his death; which event did not happen, and therefore, the devise over never took effect. This case is distinguishable from all the others but the last. In general the cases have been where after a devise to one and his heirs, the limitation over has been, in case he died without heirs, to one who might be his heir; where it was manifest that by the word heirs, was meant heirs of the body: but this does not apply where the limitation over is to one of the half-blood, who could not be heir to the first taker. Without entering into the distinction between real and personal property, in construing the words *dying without issue*; whether to be taken as a general failure of issue, or to be confined to the time of the death; which distinction is commented upon by Lord C. J. *Wilmot* in *Keiley v. Fowler*, *Wilmot's Rep.* 298, and by Lord *Kenyon* in *Porter v. Bradley*, 3 Term Rep. 146, *Roe v. Jeffery*, 7 Term Rep. 589; it is now settled, that even in the case of real property any slight circumstance which shews an intent in the testator not to use the words *die without issue* in their strict legal sense, as importing a general failure of issue at any future time, will restore them to their natural sense, as purporting a *dying* without issue, *at the time of the death* of the first taker. This also appears from *Wilkinson v. South*, 7 Term Rep. 555, and *Hockley v. Maubey*, 3 Bro. Ch. Cas. 82. Now here the intention of the testator clearly was, that *Joseph* should take a fee if he had issue; for he uses the word *then*, which must refer to the time of the death. Again, the devise is not merely to him and "his heirs," but to him and his heirs *and assigns for ever*;" giving him, therefore, an *assignable* estate. Now an estate tail is not an *assignable* estate; for it only endures while there are heirs of the body of the first taker. He was to take a fee in all events, except that on which the estate was given over, namely, if he had no living issue at the time of his death. The only direct authority against this is *Roe d. Scott v. Smart*, of which there does not appear to be any professed note of what passed in Court; but the account of the case is collected from Mr. *Fearne's* papers and opinions. It appears however, that the testator was there parcelling out his estate amongst his sons, and regulating the succession from one to another, so as to preserve the whole in the family: and therefore could not intend that they should take the fee.

Lord ELLENBOROUGH, C. J. The general rule is clear, that the words "in case my said son *Joseph* shall die without issue," must be construed to mean a general failure of issue. And according to the opinion of Lord *Thurlow* in *Bigge v. Bensley*, 1 Bro. Ch. Cas. 190, "the general words are to be varied only by circumstances arising on fair demonstration." Lord *Thurlow* said, that there were not less than 57 cases upon this point, and that to call "dying without leaving issue" the natural sense of dying *without issue*," is against all the cases. And he referred to *Dormer v. Beauclerk*, Willes, 1. as deciding that the word *then*, which was merely a word of relation, and not an adverb of time, made no difference. That is extremely decisive against the only word upon which originally any argument could have been built. For as to the word *assigns* which follows *heirs*, we cannot collect any different in-

tention from the addition of it, than if the word *heirs* alone had been used. Whether an estate be given to a man and his heirs, or to him and his heirs and assigns, must be the same thing in legal construction. The estate then being at first given to *Joseph*, his heirs and assigns for ever, would have given him the fee; but the premises, however large, may be restrained by the context; as premises, however narrow, may be enlarged by it. Here then the testator goes on to say, that "in case *Joseph* shall die *without issue*, then," he gives it over to the child which his (the testator's) wife is ensient with; which clearly gives *Joseph* only an estate tail; according to *Brice v. Smith*, where all the cases are collected; among others *Altham's* case, 8 Co. 154 b, in which the same rule is applied to deeds; as "if a man give land to one and his heirs, *habendum* to him and the heirs of his body, he shall have but an estate in tail, and no fee expectant; for the *habendum* qualifies the general words precedent." And so it was said by Lord Keeper *Wright* in *Bamfield v. Popham*, 1 Pr. Wms. 57, "that where in the premises an estate is given by deed to one and his heirs, and if he die *without issue*, &c.;" these words are sufficient to restrain the former words, and turn the fee into an entail. If such would be the effect of the latter words to restrain the former in a deed, I see no reason why they should not have the same effect in a devise: and then according to all the cases, *Joseph* the son took only an estate tail; which being now spent, the lessor of the plaintiff is entitled to recover.

GROSE, J. It is impossible to read the will without seeing that the testator intended that if *Joseph* had issue, that issue should take; and that if he died without issue, the issue of which the second wife was ensient should take the estate: and this intention can only be effectuated by giving *Joseph* an estate tail.

LE BLANC and BAYLEY, Justices, concurred in opinion that neither the word *then*, nor the word "*assigns*" were sufficient to shew an intention in the testator to use the words, "in case my said son *Joseph* shall die *without issue*," in any other than their acknowledged general legal sense; or to except this out of the general current of authorities.

Postea to the Plaintiff.

The King v. The Inhabitants of Tibbenham.

9 East, 338. May 14, 1808.

A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, is removable as an unmarried woman under sec. 6 of stat. 85 G. 3. c. 101, and the presumption of her being chargeable arises by the same clause from the bare fact of being with child of a bastard, if no circumstances be stated to shew that such presumption is not applicable to a person in the particular situation of the party coming within the general description of the clause. And the order of removal may charge such a person generally as actually chargeable, without setting forth in what manner chargeable.

UPON complaint of the parish officers of *Diss* in *Norfolk* "that *Rebecca Knowles*, wife of *John Knowles*, lately came to inhabit in *Diss*, not having gained a legal settlement there, and that the said *Rebecca Knowles* is actually become chargeable to the said parish of *Diss*;" two justices "upon due proof made thereof, as well upon the examination of the said *R. K.* upon oath as otherwise, and likewise upon due consideration had of the premises, adjudged the same to be true," and likewise adjudged the lawful settlement of the said *Rebecca* to be in *Tibbenham* in the same county: and so they conclude their order of removal in the common form. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on a case, stating that the pauper's husband *John Knowles*, being settled in *Tibbenham*, went to the *East Indies* four years ago, and has never returned. That at the time of the removal

the pauper was residing in *Diss*, and pregnant of a child, which has since been born a bastard in *Tibbenham*. That the pauper never received any relief from *Diss* parish, nor was chargeable in any other manner than as above mentioned.

This case was first argued by the appellant's counsel in the last term, when the Court were agreed in confirming the order : but a question of the like nature having occurred in the case of *The King v. Diddlebury*(a), which was then argued, and directed to stand over for consideration ; the Court, upon a suggestion that a similar question might arise upon the face of the order of removal, which by mistake had not been returned with the case, directed this case also to stand over, to be spoken to again in this term : and in the mean time, that the original order should be regularly returned.

Frere now argued in support of the orders ; and referred upon the first point to the opinion delivered by the Court in the last term ; that the pauper, though a married woman, yet being pregnant of a child which by law was a bastard, was capable of being removed as an *unmarried* woman for this purpose, within the provision of the 6th sect. of the stat. 35 Geo 3. c. 101. And in addition to the cases after mentioned, he referred to *The King v. Luffe*, 8 East, 193. The next and principal question, on which the case had been directed to stand over, was, whether the pauper could be said to have been actually *chargeable* to the parish from the mere circumstance of her having been pregnant with a bastard at the time. As to which the words of the statute are express, "that every unmarried woman with child shall be deemed and taken to be a person actually chargeable, within the intent and meaning of the act." The case is also within the reason of the act : for before the passing of it such a person was removeable as likely to become chargeable, not merely on her own account, but on account of the permanent burthen of maintaining the child, which the law presumes is likely to become chargeable to the parish where it is born, *Rex v. Matthews*, Salk. 478. When the stat. 35 G. 3. passed, which altered the principle of removals, confining them to cases where the paupers were actually chargeable, the necessity of this provision was obvious ; otherwise the parish to which the mother belonged would have relieved her in the parish where she resided until after her delivery, in order to settle the bastard there. In the case of *The King v. Great Yarmouth*, 8 Term Rep. 68, which turned on the form of the order, it was not even adjudged that the pauper was chargeable, as a fact ; but only that she was with child, which was likely to be born a bastard, and "that she was deemed to be a person actually chargeable," &c. ; and without negating her having a certificate ; which the Court held to be unnecessary, as a certificated person in that situation was liable to be removed under the late act. The case of *The King v. Alveley*, 3 East, 563, which will be relied on *e contra*, is distinguishable from this in several respects ; 1st, the order after stating that *J. H. single woman* was with child, and was therefore deemed chargeable, &c., adjudged the premises to be true ; stating it therefore, merely as a conclusion of law, and not as an adjudication of the fact. 2dly, The circumstances of the case rather shewed that she was a person of sufficient substance and ability to provide for herself. But, 3dly, the principal ground of the decision was, that being in the service of her master under a contract of hiring for a year, she was not removeable at all against the consent of the contracting parties ; according to the cases of *Rex v. Marlborough*, 12 Mod. 402, *R. v. Brampton*, Cald. 11, and *R. v. Ozleworth*, Burr. S. C. 302, 4. *Prima facie*, at least, the circumstance of a woman being pregnant with a bastard raises a presumption by the statute that she is actually chargeable, and liable to be removed ; and if there be any facts which go to rebut that presumption, it lies on the appellant parish to shew them : as where a *wife*, as such is removed without her husband, it is not necessary for the removing parish to

(a) Vide the next case, p. 396.

shew the husband's consent', but it lies on the appellants to shew his dissent, *St. Michael in Bath v. Nunny*, 1 Stra. 544.

Bowen, contra, relied principally upon the case of the *King v. Alveley*, 3 East, 563, where the stat. 35 G. 3. had been expounded not to extend to make persons removeable, who were not proper objects of removal before that statute, as being likely to become chargeable; but only to enable the magistrates to remove women pregnant with bastards, as actually chargeable, and therefore removeable within the principle of that law, if in other respects fit objects of removal; and that a single woman with child was not *therefore* and necessarily to be deemed chargeable, without more. If then the condition of such a person only determines her removeability, and not that she ought *therefore* to be removed, it was not incumbent on the appellants in the first instance to prove her substance or ability to maintain herself, or the like, in order to rebut the presumption of her being in fact likely to be chargeable; but the onus probandi lay upon the respondents in this as in all other cases, to shew that the pauper was a fit object of removal. Here, however, it is expressly stated, that the pauper *never received relief* from the parish, *nor was chargeable in any other manner than as above mentioned*; that is, by being pregnant with a bastard: which rebuts the presumption of her being then chargeable otherwise than in this qualified sense.

LORD ELLENBOROUGH, C. J. The first question is whether a married woman, who, in the absence of her husband abroad, is pregnant under such circumstances as that the child, when born would be deemed by law a bastard, be liable to be removed under the act of the 35 G. 3. ? The act indeed says, "that every *unmarried* woman with child shall be deemed and taken to be a person actually chargeable within the true intent and meaning of the act," and removeable: but the legislature plainly had in view that every woman pregnant of a child, which was not protected by the matrimony of its parents, but would when born be a bastard, should be removeable, whether married or unmarried; for though the mother were married, yet if her child would by law be a bastard, she was *in pari jure*, within the scope of this act, with an unmarried woman who was pregnant. The next question is, whether the order of removal be good in the form of it? It states the complaint of the parish officers of *Diss*, that *Rebecca*, the wife of *John Knowles*, is *actually become chargeable* to their parish, &c.; and the justices upon due proof made thereof adjudge the same to be true. The act says, that a woman under the circumstances I have stated "shall be *deemed and taken* to be a person *actually chargeable*," &c. Have not then the justices done enough in stating that the pauper was "actually become chargeable to the parish?" They are to draw the conclusion whether chargeable or not, and it is enough for them to state that conclusion upon the face of the order, without stating the premises on which it was founded. If that conclusion be disputed, the party is to appeal; and such appeal having been made, and the facts stated to us, it is to be seen, thirdly, whether the premises warranted the magistrates in drawing that conclusion. The legislature intended that an unmarried woman, or, what is the same for this purpose, a married woman under the circumstances I have mentioned, being with child is *prima facie* chargeable within the law: it raises a presumption of her being chargeable. But I say again, as I said before in the *King v. Alveley*, that if it appear that the woman is a person of substance, and that there is no pretence to say, that she is likely to bring a burthen upon the parish, the act did not intend to make such a person liable to be removed. But it is made a presumptive chargeability, so as to put it on the party disputing it to shew that she is a person of substance, or, as in the case of the *King v. Alveley*, a person under a contract of hiring and service with another at the time, so as to rebut the presumption. The only cases that materially affect the construction of the clause in question are, first, *Rex v. St Mary Westport*, 3 Term Rep. 44, which was the case of a certificated

person, who under the stat. 8 and 9 W. 3. c. 30, was not removeable till actually chargeable; and it was held that one of the family of the certificated person, being pregnant of a child likely to be born a bastard, was not removeable under that act. The question was again made in the case of the *King v. Great Yarmouth*, 8 Term Rep. 68, after the passing of the stat. 35 G. 3., where the residence of a person so circumstanced under a certificate was held to be no objection to her removal. It is not necessary here to affirm or to disaffirm that case, as it related to the certificate act. Then came the case of the *King v. Aloeley*, where the principal point decided was, that a single woman being with child did not operate such a dissolution of the contract of hiring and service, as to make her removeable against the consent of herself and her master. The court also said, I have no doubt, what is stated in the report, respecting persons of substance not being within the view of the act of the 35 Geo. 3. But there is one observation attributed to me with which I cannot charge my recollection, and which, at any rate, I am not prepared to abide by, namely, that where the act says, that such a person *may* be removed: it does not say that she *shall* be so. Now I do not think that the use of the word *may* there, as contradistinguished from *shall*, makes any difference in the sense. If the party come within the true intent and meaning of the clause as there described, I think the true reading of the words "*may* be removed," is that she "*shall* be removed." All the statutes respecting the removal of the poor form together one system of law, and it is a condition precedent, if I may so say, that the persons to be subjected to their operation should be in the condition of poverty. When therefore the clause in question says, that unmarried women with child shall be deemed to be actually chargeable, &c. for the purpose of subjecting them to be removed, it means that persons so situated shall *prima facie* only be deemed to be chargeable, and it still leaves it open to shew that the party is of substance, so as not to be within the scope and view of the poor laws. Therefore whether in the form of the order it be said, that the woman so circumstanced is deemed to be chargeable, or is therefore chargeable, or that she is chargeable, it is all alike, and equally good; and she must be presumed to be in the situation in which she is considered by the legislature as being, namely, as actually chargeable to the parish where she is inhabiting, and consequently liable to be removed, unless the contrary be shewn. Here then it is sufficiently adjudged in the order, that the pauper was actually chargeable, so as to make her removeable under the act; and it appearing by the facts stated on the appeal, that though married, yet that her husband was abroad and could not have been the father of her child; this was a *prima facie* case to bring her within the 6th clause, and to shew that she was actually chargeable within the meaning of the act: and nothing being shewn to rebut that presumption, it remains presumptively established that the pauper was within the description of persons liable to be removed.

GROSS, J. Looking to the general policy of the poor laws, and to the object of the last statute, we can only consider the being pregnant of a bastard as a *prima facie* presumption of the woman being chargeable within the meaning of the 6th clause. Then I look to see whether there be any thing stated in the case to rebut that presumption; and nothing of that sort appearing, it is not inconsistent with any of the former decisions to say that this woman was removeable.

LE BLANC, J. This question turns on the construction of the 6th clause of the stat. 35 Geo. 3. c. 101., and the single point is, whether upon the fact stated in the order of removal, that *Rebecca* the wife of *John Knowles*, the person removed, was actually become chargeable to the parish, coupled with the facts stated in the case, shewing in what way she became chargeable, she were liable to be removed. The justices by their order adjudge her to be chargeable; and the sessions on appeal state her situation to be this, that she was the wife of a man, who, four years before, had gone to the *East In-*

dies, from whence he had never returned; and that at the time of the order made, she was pregnant of child, which had since been born a bastard; and they further add, that she had never received any relief, nor was in any other manner chargeable to the removing parish than as before mentioned. The sessions then confirm the order of the justices adjudging her to be chargeable, and removing her; and they do not state any thing in their case to shew that she was not removeable. The stat. 35 G. 3. was passed to prevent persons in general from being removed until they were actually chargeable; but contemplating the inconvenience which would result from the generality of this provision in the instance of unmarried persons being with child where for the most part there was every probability of their becoming chargeable to the parish in which they were delivered, and which would be burthened with the maintenance of the bastard when born; they adopted the high degree of probability existing in most instances as a foundation for a general rule; and therefore enacted by the 6th section "that every unmarried woman with child should be deemed and taken to be a person actually chargeable within the true intent and meaning of the act." The first question then is, whether the pauper, who is a married woman, but whose husband, being absent in the *East Indies* before and during the time of her pregnancy, could not by possibility be the father of her child, come within the description in this clause? Literally, she does not: but I think she does come within the meaning of the act, being pregnant with a child, which could not possibly have been begotten by her husband, and which has since been born a bastard: and therefore this is not like a case of doubtful issue, where it may admit of question whether the child with which a married woman is pregnant will when born be a bastard; but it is the case of a removal of a married woman under circumstances where by no possibility the child with which she was pregnant could be any other than a bastard. Looking therefore to the meaning of this law and to former analogous decisions, I think she was an *unmarried* woman for this purpose. Then the only question is, whether she were chargeable? Now, I cannot enter into any speculative reasoning to shew that she was not in fact chargeable, when she is stated or described to be such a person as the legislature have said shall be deemed and taken to be actually chargeable. How far facts may be adduced (I will not say to rebut the presumption that such a person is chargeable) to shew that the person to be removed is not an object of the poor laws, as in the case of the *King v. Alveley*, will be fit to be decided whenever the question arises upon a case in judgment before us. It is sufficient to say, that nothing appears here to shew that this woman was not an object of the poor laws.

BAYLEY, J. Before the stat. 35 G. 3. every person likely to become chargeable was liable to be removed: that statute altered the law in that respect, and provided generally that no person could be removeable till actually chargeable: but by the 6th section it also provided, that every unmarried woman with child should be deemed to be a person actually chargeable. Now the narrowest construction which can be put upon those words is, that an unmarried person likely in fact to become chargeable should be removeable as before; and that the fact of such a person being with child was at least intended to be made *prima facie* evidence of being chargeable: that presumption, therefore, ought to have been, if it could have been, rebutted by the party resisting the removal. If the mother had died in child-birth, the charge of maintaining the child would have been thrown entirely on the parish; for her next of kin would have been entitled to take all her personal property. Then considering that there is nothing stated in the case to shew that the mother was in a condition to maintain her child, or that any other provision was made for it, we cannot come to any other conclusion than that she was chargeable within the meaning of the act. And I also agree, that she must be considered as an un-

married woman within the meaning of the same clause; the child being a bastard by law, and the husband not under any obligation to provide for it(1).
Both orders confirmed.

The King v. The Inhabitants of Diddlebury.

9 East, 398. May 14, 1808.

An order of removal founded on the st. 35 G. 3. c. 101. s. 6. stating that *A. E. single woman* was "by being pregnant deemed to have become chargeable," &c. is good.

UPON the complaint of the parish officers of *Tipton*, in the county of *Stafford*, "that *Ann Evans, single woman*, had come to inhabit in the said parish of *Tipton*, not having gained a legal settlement there, nor produced any certificate owning her to be settled elsewhere, and is, by being pregnant, deemed to have become chargeable to the said parish of *Tipton*;" two justices upon due proof made thereof, as well upon the examination of the said *Ann Evans* upon oath, as otherwise, and likewise upon due consideration had of the premises, did adjudge the same to be true, and that the lawful settlement of the said *Ann Evans* was in the parish of *Diddlebury* in the county of *Salop*," &c. The sessions, on appeal, found, specially, that the pauper *Ann Evans*, being a single woman legally settled in *Diddlebury*, and becoming actually chargeable to *Tipton* within the meaning of the statute (35 G. 3. c. 101. s. 6.), by being pregnant with a child who had since been born a bastard, was removed from *Tipton* to *Diddlebury*; and that the pauper appeared to be a labourer without substance, the mother of other bastard children, and not a hired servant, was properly removed as actually chargeable; therefore they confirmed the order of removal.

This case came on to be argued in the last term after the case of the *King v. Tiddenham*(a), when *Peake* and *Pettit* were heard in support of the orders, and *Jervis* and *Clifford* against them. These latter contended, that after the case of the *King v. Alveley*, 3 East, 563, it ought to have been alleged on the face of the order of removal, that the pauper was actually chargeable in fact, and not merely as an inference of law from the fact of her being pregnant; since that inference did not arise from the mere fact of pregnancy, without other circumstances shewing that the pauper was in such a situation as before the act of the 35 Geo. 3, would have made her liable to be removed as a person likely to become chargeable: and that this defect in the order could not be helped by the finding of the Sessions, *Rex v. Great Bedwin*, Burr. S. C. 163, in the case, that she was a labourer, without substance, &c. The case was then directed to stand over for consideration with the antecedent one; and after the decision of that case,

Lord ELLENBOROUGH, C. J. said, that there was little more to add, with respect to this, than that the orders should be confirmed. On the facts of the case as bringing it within the general policy of the poor laws, and the words of the act of the 35 G. 3., there could be no doubt; and with respect to the form of the order of removal, the premises are stated, as in the statute itself, from whence the conclusion is drawn; and therefore all is stated which the statute requires(2).

Both orders confirmed.

(1) Vide *The King v. The Inhabitants of Holm, East-Waver Quarter*, 12 East 381.

(a) The last case, p. 388.

(2) Vide *The King v. The Inhabitants of Holm, East-Waver Quarter*, 12 East, 381.

Doe on Demise of Wright v. Cundall.

9 East, 406. May. 17, 1808.

Under a devise of land to the two children of the testator's brother W. when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage; but if either should die before 21, the survivor to be heir to the other: Held that the fee passed, which would go over to the survivor in case one died under 21, and would descend or be disposeable if he died after attaining 21: and that a devise of other land to the two children of another brother R. on the same conditions as W.'s children, was governed by the same construction.

THIS ejectment was brought for an undivided third part of four houses at *Westham*, in *Essex*, mentioned in the bequest contained in *Richard Wright's* will in favour of *Robert* and *Rebecca* the two children of his brother *Robert Wright*. At the trial a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

Richard Wright, the testator, being seised in fee (*inter alia*) of the said four houses, by his will duly executed, dated the 6th of September 1771, devised thus: "Item, I give and bequeath unto the two children, *Elizabeth* and *Jemima*, daughters of my brother *William Wright* deceased, the first four freehold houses next my dwelling house, built by me in 1770, when they have attained the age of 21 years. But the executor and executrix shall be accountable for the profits of the said houses unto the said children, until the aforesaid age of 21 years or the day of marriage. But if either of them should die before the said age of 21 years, then the survivor shall be heir to the other two houses. Likewise, I give and bequeath unto the two children, *Robert* and *Rebecca*, son and daughter of my late brother *Robert* deceased, the next four houses adjoining to the same, on the same conditions as my brother *William Wright's* children." After some pecuniary legacies the will contains the following residuary clause. "I give and bequeath all the residue and remainder of my effects or estate of what kind soever, both freehold, leasehold, cash, book debts, stock in trade, stock on the land, such as horses, &c. and all and every part of what shall be owing to me at my decease, unto my brother *John Wright*, my sister *Mary Frument*, and my sister *Jemima Jones*, equally, share and share alike, between them; leaving it to their free will whether they will divide the freehold and leasehold estate and annuity of *William Berks* in an equitable manner between them, or to sell the said estates and divide the money arising from the sale of the same." The testator died soon after the making his will; leaving *Robert* and *Rebecca*, the son and daughter of *Robert Wright* the testator's brother, who were infants at the time of his death, him surviving, but who both lived to attain the age of 21. *Rebecca* intermarried with the defendant *John Cundall*, clerk, had issue by him, and died on the 21st of June 1806 before the day when the demise is laid. *Robert Wright* and *Rebecca*, the devisees of the four houses in question entered into the receipt of the rents and profits, thereof from the testator's death, and continued in such receipt until the death of *Robert*, who died some time since the intestate leaving *Rebecca*, his sister, his heir at law. After his death, the defendant *John Cundall*, in right of his wife *Rebecca*, intered into possession of the four houses, and still continues so, claiming to be the tenant thereof by the curtesy. The three residuary devisees named in the will survived the testator. *John Wright*, one of them, has since died intestate: leaving the lessor of the plaintiff his eldest son and heir at law. The question for the opinion of the Court was, Whether *Rebecca Wright*, the daughter of the testator's brother *Robert*, after the death of her brother *Robert*, had an estate for life only, or in fee, in the four houses above mentioned. The lessor of the plaintiff insist-

ed, that she had only a life estate; that the reversion having passed under the residuary devise, fell in on the death of *Rebecca Cundall*; and that he is now entitled to one third of these premises as heir at law of *John Wright*.

Wetherell for the lessor of the plaintiff said, it was agreed that if the two children of the testator's brother *Robert*, viz. *Robert* and *Rebecca*, (who were to take *on the same conditions*, i. e. estates of the same nature as *Wm. Wright's* children, the devisees of the first four houses,) took only life interests, the undisposed reversion passed under the residuary clause: in which case it was also agreed that the lessor of the plaintiff was entitled to one third. He then contended, that these children took only life estates in the premises, with a life estate in the whole to the survivor, by force of the devise that "the survivor shall be *heir* to the other." For that wherever the word *heir* is used in a will for the purpose of carrying over an interest which determined on the death of the first taker, the second only takes by way of *substitution*, and therefore only takes the same interest as the other had; according to *Spark v. Purnell*, Hob. 75, and *Gymes v. Kemsley*, Freem. 293, in which latter case however the question was adjourned. The will too is inartificially drawn; and the word *heir*, in its popular sense, imports *succession*, rather than the degree of interest which the person takes. It may be said, however, that there is a difference, where the first devise is to an infant, and if he die under age, then over to one who would be his heir; that the first taker attaining his full age will take a fee. But that stands only on a *dictum* of *Saunders* in his report of *Purefoy v. Rogers*(a), and is contradicted by *Fowler v. Blackwell*, Com. Rep. 353, where the opinion was adjudged otherwise.

Marryat, contra, was stopped by the Court.

Lord ELLENBOROUGH, C. J. Admitting that the word *heir*, as here used, is merely a word of substitution (an admission which I would not be bound by generally,) still there is enough in the will to indicate an intention in the deviser, by the devise to his brother *Robert's* children, *on the same conditions* as his brother *William's* children, (by which must be understood that he devised the premises to *Robert's* children in the same terms as the preceding devise,) namely, when they attained the age of 21 years, and the executors to be accountable to them for the profits in the mean time; and that *if either of them died before 21, the survivor should be heir to the party so dying*; that the party so dying should have a fee, which should go over to the survivor in that event, or should vest absolutely in the party attaining 21. Here then *Robert* the nephew, having attained 21, on his death the premises descended to his sister *Rebecca*, his heir at law. What is said at the conclusion of the case of *Purefoy v. Rogers*, as far as the opinion of a very learned man goes, is in support of this construction. But it does not rest on that; for the subject was very fully and distinctly discussed in *Frognorton d. Bramstone v. Holyday*, 3 Burr. 1618, where Lord Mansfield, commenting on similar words, after a devise of premises generally to *J. H.* the deviser's son, charged with the payment of 50*l.* out of the yearly rents; and *if J. H. shall die in his minority*, then over to her three daughters; says, that those words, *if he should die under 21*, shewed her intention to give a fee: for if he lived to 21, he might then dispose of it himself: but if he died before, he could not; and then she disposed of it. If *J. H.* was barely to take an estate for life, the time of his death must be immaterial to the devise over. But limiting it over only upon the contingency of his dying in his minority shews that she intended to give him an absolute estate in fee, which he might dispose of if he came of age: and unless he lived to be of age (when he might dispose of it,) she meant it should go to her daughters. The whole doctrine and effect of these words were there so

(a) 2 Saund. 388 a. Vide *Moone v. Heaseman*, Willes, 143, and *Robinson v. Grey*, ante, 1.

fully stated, that it is unnecessary to add any further authority. But Lord Mansfield in another case, *Goodtitle v. Whitby*, 1 Burr. 334, mentions a case of *Tomkins v. Tomkins* in Chan. H. 17 G. 2, where the devise was "to his brother in trust for his eldest son B. till he should attain 21; and if he should die before 21, then a devise over." The Court held the age of 21 to be no limitation of B.'s interest, but only a limitation of the trust during his minority, and that B. took the whole by implication(1). There are other authorities which might be cited, that a giving over on a dying before 21 shews an intention that if the party attain 21 he should have a fee absolute.

The other Judges concurring,

Postea to the Defendant(2).

Roe on the Demise of Joseph Hucknall and Others v. Foster.

9 East, 405. May 17, 1808.

John Lealand surrendered a copyhold, in the occupation of him *John Lealand*, to the use of *Joseph Lealand* and *John Lealand* his son, for their lives, and the life of the survivor; remainder to the heirs of the body of the said *John Lealand* son of *Joseph L.*; remainder to the right heirs of the said *John Lealand*: held that the ultimate remainder was meant for the right heirs of *John* the surrenderor; as well because *John* the surrenderee is before described with the addition of the son of *Joseph*; as of the manifest fatuity of giving *John* the surrenderee an estate tail, and afterwards a fee in succession. Though if the construction had been left doubtful, the ultimate remainder would have continued in the surrenderor.

THIS was an ejectment for a copyhold in the county of *Lincoln*; and the declaration consisted of four counts, one upon the joint demise of all the lessors of the plaintiff, and the others upon the several demises of *Joseph Hucknall*, *Ann Lealand*, and *Sarah Lealand*. A verdict was taken for the plaintiff subject to the opinion of the Court upon the facts.

The premises in question are copyhold of the manor of *Scotter*; of which premises *John Lealand*, being seised in fee, on the 3d September 1682, made the following surrender, "*Man. de Scotter, &c.*" (after setting out the stile of the Court held on the 3d of October 1682), ad hanc curiam presentatum est per R. B. et T. S. duos customarios tenentes domini manerii prædicti, super sacra, quod *Johannes Lealand* extra curiam, scilicet tertio die Septembris ult: præterit; venit coram eisdem R. B. et T. S. &c. ac per eorum manus sursum reddidit in manus domini manerii prædicti, secundum consuetudinem ejusdem manerii, unum messuagium, &c. (describing the premises) in *Scotter* predicta, in tenura predicti *Johannis Lealand*, ad opus et usum *Josephi Lealand* et *Johannis Lealand* ejus filii pro et durante termino vitarum suarum naturalium et eorum diutius viventis; et post eorum decessus, ad usum hæredum de corpore dicti *Johannis Lealand* filii *Josephi Lealand* in perpetuum; et pro defectione talium existentium ad usum rectorum hæredum dicti *Johannis Lealand* in perpetuum: quibus quidem *Josepho* et *Johanni* dominus manerii prædicti per Senesc: suum ibidem concessit, &c."

Joseph Lealand and *John Lealand* the surrenderees are both dead without issue; *John* having done no act to bar the estate tail. The lessors of the plaintiff, *Mary Hucknall*, *Ann Lealand* and *Sarah Lealand*, are the right heirs of *John Lealand* the surrenderor, and have been duly admitted to the premises in question. The defendant is the tenant in possession under the right heirs of *John Lealand* the surrenderee. The question for the opinion of the Court arose upon the construction of the said surrender; namely, Whether the

(1) Vide *Everts v. Chillenden*, 2 Day, 388.

(2) Vide *Toovey & al. v. Bassett & al.* 10 East 460.

remainder in fee, after the determination of the estate tail of *John Lealand* the surrenderee, decended to the right heirs of *John Lealand* the surrenderor, or to the right heirs of *John Lealand* the surrenderee : if to the former, the verdict for the plaintiff was to stand : if to the latter, the verdict was to be entered for the defendant.

Reader for the plaintiff contended, that the remainder in fee, after the death of *John Lealand* the surrenderee was limited to the right heirs of *John Lealand* the surrenderor. The names of the two *John Lealands* occur twice before the ultimate limitation "to the right heirs of the said *John Lealand*;" and on both occasions the name of *John Lealand* the surrenderor is mentioned, as in the ultimate limitation, without any further addition : whereas *John Lealand* the surrenderee is both times named with the addition of *filius Josephi Lealand* ; and when he is afterwards mentioned without the addition, he is still coupled with his father, as the surrenderees ; in which place there could be no difficulty as to the person meant.

Morice, contra, relied on the word *said* (to the use of the right heirs of the said *John Lealand*) as referring in grammatical construction to the *John Lealand* last before named, which was *John Lealand* the surrenderee : and cited *Weale v. Lower*, Pollex. 63 : but finding the Court decidedly against him on the construction of the surrender, he did not urge the argument further.

LORD ELLENBOROUGH C. J. It would be sufficient for the lessor's counsel to shew that it was quite uncertain on the face of the surrender to which of the *John Lealand's* right heirs the estate was ultimately to pass : for unless it were shewn distinctly to pass out of the surrenderor, it would necessarily remain in him. But there is no uncertainty in the words ; for the name of *John Lealand* the surrenderee no where occurs before without the additional description of him as the son of *Joseph*. Besides which the sense of the thing shews that the ultimate limitation was to the right heirs of *John Lealand* the surrenderor : for otherwise, there would be a useless circuitry of expression, by the construction contended for by the defendant, in first giving *John Lealand* the surrenderee an estate tail, and then immediately afterwards a fee ; when it would have been more direct and obvious to have given him the fee at once, if that had been intended. But if the surrenderor meant to give it to his own right heirs, then the words used are proper.

The other judges concurred ; and LE BLANC, J. added, that *John Lealand* the surrenderee, was described as plainly as if he had had a distinct name from the surrenderor, being described as the son of *Joseph*.

Postea to the plaintiff.

Paxton and Others v. Sir Home Popham and Mac Arthur.

9 East, 408. May 17, 1808.

To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at respondents interest, secured by a cargo of goods shipped from *Calcutta* to *Ortend* ; it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the *East Indies*, and illegally prepared by the plaintiffs for shipment from thence to beyond the *Cape of Good Hope*, without the licence of the *East India Company* ; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond ; but if it were inconsistent with it, the plea would still be good in this form.

THE plaintiffs declared in debt, in their first count, upon a bond executed by the defendants (therein described to be then of *Calcutta*, and the defendant Sir H. P. also described to be part owner of the ship and cargo

of the *Stadt Van Weenen*,) dated the 1st of *January* 1789, at *Calcutta*, whereby they bound themselves to the plaintiffs, described as of *London* in the penal sum of 6500*l.* with this agreement and condition : that whereas the defendant had *taken up, borrowed, and received* of the plaintiffs the full and just sum of 3250*l.* which was to run at respondentia on the ship *Stadt Van Weenen* from *Calcutta* to *Ostend*, &c. at the rate of 10*l.* per cent. premium for the voyage, if performed in nine months ; in consideration of which the usual risks of the seas, &c. to be on account of the plaintiffs ; and for the *farther security* of the plaintiffs, the defendants had agreed to mortgage and assign over to them the several goods laden or to be laden on the ship during the voyage, until payment of the principal and premium of that bond : the condition of the bond was, that if the defendants should pay to the plaintiffs the full amount of the bond and premium in *London* at the end of nine months after the safe arrival of the ship at *Ostend*, or, in case she was lost, the customary average on the salvage, then the bond was to be void. The plaintiffs then averred, that the ship afterwards sailed with a cargo of goods from *Calcutta* to *Ostend*, and on the 25th of *August* 1789, within the nine months arrived at *Ostend*, whereby the defendants became liable to pay in *London*, at the end of nine months after such her arrival, the full amount of the bond and premium amounting to 3575*l.* : and then alleged a breach in nonpayment of that sum on demand. The second count was on a bond of the defendant's dated at *London* on the 23d of *March* 1790, (describing the defendant *Popham* as of *Ostend*, and the other defendant as late of *Ostend*, then of *London* ; and describing the plaintiffs as merchants of *London* ;) with this condition ; reciting that the defendants had given, at *Calcutta* on the 1st of *January* 1789, sundry bills and a respondentia bond in favour of the plaintiffs, of which there remained unpaid a bill of exchange drawn by *Mac Arthur* on *Marsh and Creed* of *London* (not accepted) for 1041*l.* 13*s.* 4*d.* and the respondentia bond (mentioned in the first count, for 3250*l.* and the premium, &c. ; and that the defendants, desirous of making good those engagements, had taken steps for conveying the property of such part of 44 bales of piece goods then in possession of *Gregorie and Co.* of *Ostend*, as had not been paid to the defendants, exclusive of 3000*l.* previously assigned to *Charnock and Co.* of *Ostend* : so that the plaintiffs might receive remittances from *Gregorie and Co.* for the said goods deducting the 3000*l.* and 800*l.* already paid to the defendant *Mac Arthur* ; but that being well aware that the said proceeds would not in all probability be adequate to the full discharge of the said unaccepted bill and the respondentia bond ; the defendants thereby covenanted jointly and severally to pay all deficiencies that might be found in realizing the remittances so directed to be made to the plaintiffs : this bond was therefore conditioned to make good such deficiencies. The plaintiffs then averred, that on the 29th of *January* 1792, they received from *Gregorie and Co.* on account of the said goods a remittance of 2000*l.* which was inadequate by 4021*l.* 13*s.* to the full discharge of the said unaccepted bill and respondentia bond ; whereby the defendants became bound to make good the deficiency : and so alleged a breach in nonpayment of the last mentioned sum. There was a third special count, and other common counts, not material to be stated. The defendants pleaded *non est factum* to each of the three special counts, and *nil debent* to the rest. 3dly, That the writings obligatory in the second and third counts are the same, and that *Gregorie and Co.* made remittances to the plaintiffs on account of the proceeds of the goods there mentioned, to the amount of all the monies due. 4thly, As to the first, second and third counts, that the writing obligatory in the first count mentioned, and the respondentia bond in the conditions of the writing obligatory in the second and third counts mentioned are the same ; and that the plaintiffs and defendants before and at the time of the sale of the goods after mentioned were subjects of the King ; and that before the making of the said writing obligatory, viz. on the 1st of *December* 1788, it was unlawfully agreed between the defendants and the house of *Paxton and Co.* of which firm one of the

present plaintiffs was one, that *Paxton and Co.* should illegally, and against the statute, and without the licence or authority of the *East India Company*, sell to the defendants, and deliver in the *East Indies* beyond the *Cape of Good Hope*, divers goods for the purpose and to the intent that the said goods might illegally and without such licence be conveyed from the *East Indies* for the purposes of trade: and that *Paxton and Co.* in pursuance of that agreement afterwards sold and delivered the said goods accordingly; they well knowing for what purpose and with what intent the goods had been bought: and that they assisted the defendants in preparing the goods for carriage upon such illegal design and purpose. That the bond in the first count, and the bill of Exchange in the condition of the writing obligatory in the second and third counts mentioned, were given towards payment of the price of such goods. There were other special pleas in substance the same as the last. To the fourth and subsequent pleas the plaintiffs demurred generally, and issues were taken on the others.

Burrough in support of the demurrers, admitting the agreement stated. in the defendant's pleas to be unlawful, according to the case of *Camden v. Anderson*, 6 Term Rep. 723, and 1 Bos. & Pull. 272, insisted that there was a material distinction between the first count, and the second and third: (the two last being substantially the same.) The first count is on a bond merely for securing the payment of money borrowed: the second and third counts are on a bond given to forward the payment of a bill of Exchange as well as the bond in the first count: supposing then the fourth and subsequent pleas to be tenable as to the bill of exchange; though this would be an answer to the second count, if properly pleaded; yet if bad as to the first, the pleas, being entire, are bad as to the whole. Then taking the pleas as applicable to the first count, the bond there stated is a common respondentia bond: the pleas do not state it to have been colourably given; nor do they allege that the defendants were not indebted to the plaintiffs for the money lent: which must therefore be taken as admitted. But if a matter inconsistent with the condition of a bond be pleaded, the plea must shew the statement in the condition to be merely colourable: the rule of pleading being that the party must confess and avoid: and not being so stated, the plea is inconsistent with the charge in the count, founded upon the admission of the party under seal; which is not allowable. The condition of the bond states that 3250*l.* was taken up by the defendants of the plaintiffs to run at respondentia interest. The pleas state that the plaintiffs sold goods to the defendants in the *East Indies* for the purpose of trading with them to *Europe*, without the license of the *East India Company*, and that the plaintiffs assisted in preparing the goods for carriage, and that the bond in the first count and bill of Exchange in the second and third counts were given towards payment of the price. But it is not alleged in the pleas that the goods so sold were the goods put on board the ship; nor is the bond stated to be in any other way connected with the goods sold by the plaintiffs to the defendants than by the averment that it was given *in discharge of the price of those goods*. The averment then in those pleas is inconsistent with the statement of the bond in the first count, "that the defendants had *taken up, borrowed, and received*, of the plaintiffs the *full and just sum of 3250*l.**, for which the bond was given, and which is left admitted by the pleas. In *Macrowe's* case, Godb. 29, the condition of the bond declared on expressed it to be made for repayment of money, and the Court gave judgment against the defendant, on a plea averring that it was made to secure the lease of an ecclesiastical living, avoided by the stat. 13 Eliz. agreeably to the rule laid down in *Oldbury v. Gregory*, Moor, 564, which was debt on bond conditioned for the payment of money,) that it is not averrable that the money was to be paid for any other cause than what the obligation expresses. Admitting, however, that since the case of *Collins v. Blantern*, 2 Wils. 347, this matter might have been well

pleaded by proper averments; yet where the matter in the plea is directly inconsistent with the matter in the bond and conditioned, it is not sufficient so to plead it, without averring that what is stated in the bond and condition was merely colourable, and traversing the allegations therein contained; as was done in the last mentioned case. That was debt on bond conditioned to pay 360*l.* to the plaintiff on a certain day: to which the defendant pleaded, that before making the bond and the note after mentioned two of the obligors stood indicted for perjury, and on the day when the traverses were ready for trial it was corruptly agreed between them, and the plaintiff, and the prosecutor, that the plaintiff should give the prosecutor his note for 360*l.* in consideration of his not appearing to give evidence against the traversers, and that the latter should give the bond in question to the plaintiff to indemnify him for giving such note. And then the plea proceeded to aver, that the bond was given for the said consideration and no other; which the plaintiff well knew; and denied that the obligors were indebted to the plaintiff at the time in any sum of money or in any other respect whatsoever. To which plea there was a demurrer: and on the fourth point there made, whether the plea were properly pleaded in point of form, Lord C. J. *Wilmot* in delivering the judgment of the Court said, that the averment pleaded was *not contradictory but explanatory of the condition*: and it was said to be distinguishable from the case of *Lady Downing v. Chapman*(a), which had been cited, as of M. 6 G. 2, where

(a) The case is not reported, but Mr. Burroughs stated the plea from Mr. Serjeant Jenson's brief.

Lady DOWNING, Executrix of Sir JACOB GERRARD DOWNING, Bart. v. CHAPMAN.

To debt on bond dated 6th September, 1754, for 2678*l.* the defendant cravedoyer of the bond and condition; which reciting that the defendant had theretofore become bound to Sir Jacob in 2200*l.* by a bond dated 6th June 1750, conditioned to pay 1104*l.* 9*s.* 3*d.* and interest on the 6th of December then next, which he had not done; and that upon an account stated there appeared to be owing from the defendant to Sir Jacob for principal and interest 1839*l.* 1*s.* 3*d.*: the bond now in suit was conditioned to pay the last mentioned sum and interest: and then the defendant pleaded, 1. *Non est factum*. 2dly, That *Dunwich* in *Suffolk* is an ancient borough, having an indefinite number of freemen, and sending two burgesses to parliament; and that the freemen inhabiting within the borough, and not receiving alms, had the right of voting in the election of burgesses. That before and at the time of making the bond Sir Jacob pretended a right to and had assumed the government and direction of the affairs and concerns of the borough, and had declared and caused it to be propagated there, that such persons only as he should approve of should represent the borough in parliament; and that the defendant then was and yet is a freeman of the borough, inhabiting there, and not receiving alms, and by reason thereof had and yet has a right to vote in the election of burgesses; and that the defendant was also, at the time of making the bond, indebted to Sir Jacob in 100*l.*; and that having such right to vote, and being so indebted, on the 16th of July 1751, before the making of the bond, it was unlawfully agreed between him and Sir Jacob, that Sir Jacob should not demand the said debt of the defendant, and that in consideration thereof the defendant at all times afterwards should give his vote in the elections of burgesses of the borough for such persons as Sir Jacob should from time to time approve of, and none else, and should also serve the other purposes of Sir Jacob in the borough; and that for securing these purposes the defendant should give his bond to Sir Jacob in the penal sum of 2678*l.* with a colourable condition thereunder written for the payment of 1839*l.* 1*s.* 3*d.* with interest; but that Sir Jacob should not demand the same of the defendant so long as he continued to vote for such persons to be elected burgesses &c. as Sir Jacob should from time to time approve, and none else, and serve the other purposes of Sir Jacob in the borough. And then the defendant pleaded that in pursuance of that agreement the bond in question was given, and was therefore void in law. The plaintiff by her replication, protesting that the plea was insufficient in law; admitted the constitution of the borough as stated; and that the defendant before and at the time of giving the bond was and yet is a freeman, &c. having a right to vote in the election of burgesses; but protesting that Sir Jacob never pretended to or assumed any such right to the government and direction of the affairs or concerns of the borough, nor propagated any such notion as in the plea stated; and protesting also that the defendant before and at the time of making the said bond was indebted to Sir Jacob in more than 100*l.*; and also protesting that no such agreement as mentioned was made between Sir Jacob and the defendant, and that the bond was not given on any such

three of the Judges had decided against a plea of this nature, because they thought it inconsistent with the bond. In *Collins v. Blantern*, the plea, as the Court observed, did not contradict the bond, but only shewed how the obligation arose. So in *Pole v. Harrobin(a)*, the plea was not inconsistent with the

consideration; replied, that the defendant before and at the time of making the bond was justly and truly indebted to Sir Jacob in the said sum of 1889l. 1s. 8d. in the condition mentioned, and that for securing payment thereof the bond in question was given. To this the defendant demurred, and stated for special causes, that the plaintiff had in her replication alleged that the sum mentioned in the condition of the bond was due from the defendant to Sir Jacob, and that the bond was given for securing the repayment thereof: which was a different consideration from that stated by the defendant in his plea; and yet the plaintiff had not traversed the consideration for giving the bond insisted on by the defendant: that the replication attempted to draw in question a matter immaterial and inconclusive, and contained no matter on which a pertinent and decisive issue could be taken, but was merely argumentative, &c.

*(a) E. 22 G. 3. B. R. The following note of the case is taken from a MS. in the handwriting of the late Mr. Durnford, though probably copied by him from the note book of another gentleman then at the bar.

POLE v. HARBORN, E. 22 G. 3. B. R.

An officer cannot commute for money the services of an impressed man, nor let him go for money: and a bond given to secure the man's return on non-payment of such money is void, and may be avoided by plea disclosing the true transaction, and shewing that the man was illegally impressed.

DEBT on bond for 100l. the defendant, after craving oyer of the bond and condition; which last was for payment of 50l. "in case I do not procure J. H. Cooper now, impressed, &c. to appear and deliver himself to the plaintiff whenever he shall be called upon;" pleaded, 2dly, that J. H. Cooper was not liable to be impressed by any law, &c. and having been unlawfully impressed, the plaintiff was unwilling to discharge him unless he would agree to pay, &c. and would procure the defendant to become bound: and that it was unlawfully agreed that the plaintiff should discharge J. H. C. and that J. H. C. should pay, &c. as a gratuity and reward, &c.: that the defendant at the request of the said J. H. C. did become bound for securing the payment, &c. corruptly and unlawfully demanded, &c.: by virtue of which said several premises, the said writing obligatory, so made as aforesaid, was and is void in law, &c. To this there was a general demurrer. [And there were also questions on other parts of the pleadings not material to the present purpose.]

Wood for the plaintiff, on the demurrer to the second plea. The defendant cannot aver what is inconsistent with the condition of the bond. Jenk. 186. Carth. 800. *Chapman v. Downing*, C. B., Mich. G. 2. The last was debt on bond for the payment of money: the defendant pleaded, that it was agreed he should not be called upon unless he should act contrary to Sir Jacob Downing's directions in voting. Three justices were of opinion against the plea. *Collins v. Blantern*, 2 Wils. 347, does not impeach *Chapman v. Downing*. [Wallace, amicus curiæ, said that the proceedings in *Chapman v. Downing* were stayed on the authority of the judgment in *Collins v. Blantern*.] The defendant is estopped from controverting a fact admitted on the deed. Moor, 420. Godb. 177. Noy 79. All. 62. Sho. 59. Stra. 512. It appears that the party was impressed; which means, legally *ex vi termini*. And as to the defendant it is totally immaterial; for if it be otherwise, there is a proper mode to obtain the party's discharge; and the defendant who is a third person cannot urge the contrary, and aver contrary to the condition.

Law, contra. Duress of the principal is no plea for a surety in an obligation; as appears from Cro. Jac. 187; but the matter alleged goes to destroy the instrument itself; being either an illegal contract, or a reward for remitting an unlawful restraint. *Collins v. Blantern* is decisive. Impressing means merely detaining; and we may shew this illegal contract, which is paramount the condition.

LORD MANSFIELD, C. J. The second plea is of general consequence: it is objected to, because it is averring contrary to the condition in the bond; and on this point there is some perplexity in the cases; but there cannot exist such an absurdity as that a man shall have a good defence to an action, and not be able to shew or take advantage of it either by pleading or in evidence. Whatever is a defence in law, or ground for relief in equity against a deed, may be pleaded, and is consistent with the instrument. The language is, I did give the instrument, but under such circumstances as make it void. This does not apply to voluntary bonds. The foundation is that you shall not by parol impeach a written agreement, and say that the agreement was different: but the agreement being admitted, the party may come and shew circumstances to vitiate the whole proceeding. It was so determined in *Collins v.*

condition of the bond; the bond being conditioned to pay 50*l.* in case the defendant did not procure *J. H. C.* then impressed, &c. to appear and deliver himself to the plaintiff when called upon: and the plea being that *J. H. C.* having been *unlawfully* impressed, the plaintiff was unwilling to discharge him, unless he would agree to pay 50*l.* and would procure the defendant to become bound: and thereupon it was unlawfully agreed that the plaintiff should discharge *J. H. C.* on the defendant's becoming bound for the payment of that sum. The condition of the bond there only stated that the man was *impressed*, whether lawfully or not did not appear: and the plea in stating that he was *unlawfully* impressed did not contradict but explain the condition. The authority of *Downing v. Chapman* was left untouched. Here the pleas state a transaction independent of that stated in the condition of the bond, and there is a bare averment that the bond and bill were given for an unlawful consideration arising out of such foreign transaction, inconsistent with that stated in the condition of the bond: the one stating the consideration to have been *money borrowed and received by the defendants of the plaintiffs*; the other stating it to be for the price of the goods illegally agreed to be smuggled from our *East India* settlements into *Europe*.

Holroyd, contra, denied that the consideration for the bond as stated in the plea was inconsistent with that stated in the condition; but if it were, he still contended the bond would be void, if it appeared to have been given for any illegal consideration. The condition of the bond states that the defendants had borrowed of the plaintiffs so much. The plea states that it was illegally agreed between them, that the plaintiffs should sell goods to the defendants to be carried from the *East Indies* to *Europe* illegally and that the bond was given to recover the price of those goods. Now, goods agreed to be taken as money may be declared for as money; according to *Barbe v. Parker*(a). But since the case of *Collins v. Blantern*, 2 Wils. 347, it has been always considered, that whatever the consideration stated in the bond might be, it was competent to the defendant to aver the true consideration, however inconsistent with that stated: and indeed unless this were so, no bond could ever be avoided for an illegal consideration, as the obligee would always take care to state upon the face of it a consideration legal in itself, but as inconsistent as possible with the true one. This is done every day in cases of usury, gaming, and stock-jobbing: yet the true consideration is always admitted to be stated. [*Le Blanc*, J. This has frequently occurred in cases of annuity transactions, where, as in cases of usury, goods have been given to the obligors instead of money, as stated in the condition of the bonds.] In *Hayne v. Maltby*, 3 Term Rep. 438, the defendant, having covenanted with the plaintiff to use his patent machine and no other, was held not to be estopped from pleading in bar, to an action on the covenant, matter which avoided the patent. And in *Lightfoot v. Tenant*, 1 Bos. & Pull. 551, which was debt on bond conditioned for the payment of money, the fourth and sixth pleas were in the same form as these in question, and

Blantern, to avoid the deed. Here the party says, I was illegally impressed (i. e. *de facto* impressed), and entered into the bond to avoid being imprisoned. On the face of the bond itself this almost seems to be illegal. What authority can an officer have to let an impressed man go, or to commute his services? How can he know whether the services will be wanted? It is like a sheriff letting a prisoner go. The demurrer admits the second plea to be true, and it is a good plea.

Wood moved to amend by replying and denying the fact.

BULLER, J. This is not a case where the Court ought to assist you. The doctrine in *Downing v. Chapman* was, that you cannot aver a different condition, but may state a consideration consistent with the condition, which consideration is illegal and may prove the instrument void.

Judgment for the defendant.

(a) 1 H. Black. 283. and vide *Hands v. Burton*, ante 349.

stated that the bond was given to secure payment of the price of goods unlawfully agreed to be sold and delivered in *London* by the plaintiff to the defendant, to be by the latter shipped to *Ostend*, and from thence reshipped for the *East Indies*, and there trafficked with clandestinely; which was held to be a good bar to the action.

Burrough, in reply, said that there was no question in the last case as to any inconsistency between the matter pleaded and the condition of the bond. And as to the cases of usury, &c. where goods had been agreed to be taken as money, and the security stated the agreed value as so much money; it might have been taken to be so as against the party contracting on that basis; and then the question of inconsistency between the consideration stated in the bond and that stated in the plea would be avoided. The case of the patent turned on the original avoidance of it by force of the stat. 21 Jac. 1. c. 3, because it was not a new invention: as infancy or coverture may be pleaded in bar of an action on a bond, because they evince the incapacity of making the deed.

Lord ELLENBOROUGH, C. J. At present I cannot entertain a doubt upon the point: but if on further consideration any doubt should occur to myself or my brothers, we will mention it; and the rule for the judgment which we shall now pronounce need not be drawn up till the end of the term. I own I do not feel that palpable inconsistency which has been so much relied on in argument between the consideration stated in the plea and that stated in the condition of the bonds. The condition of the first bond states that the defendants took up so much money of the plaintiffs which was to run at respondentia interest on the security of certain goods shipped from *Calcutta* to *Ostend*: the second count is upon a bond conditioned to secure the payment of certain bills of Exchange and the money remaining due on the respondentia bond before mentioned. The pleas state that the bill and respondentia bond were given to cover the price of goods sold by the plaintiffs to the defendants for the purpose of an illegal traffic from the *East Indies*, and that the plaintiffs knowingly assisted in preparing the goods for carriage upon such illegal voyage. Now upon the adjustment of the account after the goods were sold, the parties might have calculated upon the debt as upon a loan to that amount: and therefore there is no necessary inconsistency between the two statements; even taking the case upon the strict rule of law, as it had been generally considered before the case of *Collins v. Blantern*. But since that case, to the principle of which I more readily accede than to what was laid down in *Downing v. Chapman*, which was always much questioned; there can be no doubt upon the subject. According to the doctrine of the Chief Justice in *Collins v. Blantern*, unless the obligor were permitted to contravene the condition of the bond by plea shewing the truth of the transaction, a bond would be made a cover for every species of wickedness and illegality. It would only be necessary to have a bond with a condition stating the consideration of it as widely different from the truth as possible. That case which was decided in 1767 runs on all fours with the present, except that the condition there was general for the payment of money. And since the case of *Pole v. Harrobin*, in 1782, it has been generally understood that an obligor is not tied up from pleading any matter which shews that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond. At present I see no such inconsistency: but if I did, I should still be prepared to abide by the principle of *Collins v. Blantern*, that the defendant might by his plea introduce a statement of facts inconsistent with what appears upon the condition of the bond, in order to shew its illegality.

GROSE, J. One question made is, whether the matter set forth in the defendant's plea has been well pleaded; and it is contended not to be so because it is inconsistent with what appears on the condition of the bond, and that the

matter as stated in the condition is not averred to be colourable, not distinctly traversed. I am rather inclined to think, however, that there is no absolute inconsistency between them, but that taking the whole transaction together as disclosed by the condition of the bond and in the pleas, the one may be taken in explanation of the other. And it would tend greatly to defeat the justice of the case, if this mode of pleading were not allowed. The only question then is, whether the matter so pleaded shews the consideration of the bond to have been illegal and void. Now the plea discloses an illegal agreement between the parties against the rights of the *East India* Company, and that the bonds in question were given in furtherance of that illegal agreement; being given to cover the price of goods sold and shipped for the purpose of eluding the Company's charter. This is not incompatible with what is stated in the condition of the bond: but if it were, how can a transaction of this sort be got at but by stating the true facts? If the obligor were concluded by a colourable transaction stated in the bond, it would be a receipt for getting rid of any objection to it however illegal the consideration may have been. I think therefore the rule in *Collins v. Blantern* was wisely introduced, and has been wisely assented to from that time, that wherever the consideration of a bond was illegal, the defendant may shew that by his plea.

LE BLANC, J. It is admitted, that the transaction disclosed by the plea is illegal; namely, the sale by the plaintiffs to the defendants of goods in *India* to be conveyed from thence to *Europe*, without the licence of the *East India* Company; and the plaintiffs having aided the defendants in preparing the goods for shipment for that purpose: for the price of which goods the securities in question were given. The only objection made is to the form of the pleas: and it is said, that because the bond is not conditioned for the simple payment of money, but is stated to be given for money taken up and borrowed upon respondentia, that is inconsistent with the statement in the plea that it was given to cover the price of goods sold and delivered for the illegal purpose mentioned: and that therefore the plea ought to have gone on and negatived that the bond was given for money so taken up and borrowed, and to have shewn that the transaction was colourably stated in the condition. But after the cases, breaking in upon the old rule, have determined that though the bond state nothing illegal upon the face of it, the obligor may shew by his plea that it was given for an illegal consideration, they have in effect decided that he may shew an illegal consideration different from the consideration stated in the condition of the bond. And when the plea states, that the bond was given to cover the price of goods illegally contracted to be sold and shipped, it does in effect deny that it was given for money borrowed: and it shews that the statement of the transaction in the condition was made colourably in order to cover the illegal agreement.

BAYLEY, J. said, that having advised on these pleadings when at the bar, he should not give any opinion upon the case.

Judgment for the defendants(1).

Stokes v. Mason.

9 East, 424. May 17, 1808.

An attorney of B. R., in pleading his privilege against being sued by original, improperly stated the custom of this Court to be not to compel its attorneys to answer an original writ, *unless first forejudged from their office, &c.* (which is the custom in C. B. but not in this Court:) but held that enough appearing to sustain the plea, the custom which had no foundation here, might be rejected as surplusage.

THE plaintiff sued the defendant as a common person by original, and de-

(1) For further proceedings in this case, see 10 East, 306.

clared upon a bill of Exchange accepted by the defendant and afterwards indorsed to the plaintiff. The defendant pleaded in abatement, that he ought not to be compelled to answer the said original writ, because he is and was on the day, &c. an attorney of *B. R.*; and that in the same Court there now is, and from time immemorial hath been a custom, that no attorney of the said Court hath against his will been compelled to answer any person in any personal action prosecuted here by original writ sued out, which hath not concerned the king, unless he hath been first *forejudged* from his office of an attorney of this Court, upon a bill exhibited here to the justices of our Lord the king before the king himself, against such attorney, and filed in the same Court. And then the defendant averred, that he hath not been forejudged from his office, &c. and that he is impleaded by the original writ aforesaid against his will, and against the custom aforesaid: and this he is ready to verify; wherefore, as the defendant is and was on the day, &c. an attorney of the said court, &c. he prays his privilege aforesaid to be allowed and adjudged him, &c. To this the plaintiff demurred specially, because the defendant by his plea had alleged an immemorial custom in this court, that no attorney of the court had against his will been sued by original in any personal action, &c. unless he had been first *forejudged from his office, &c.*; whereas an attorney of this court was not by the practice of the court in that behalf to be *forejudged from his office of an attorney* of this court in manner and form as the defendant had alleged: and whereas the defendant should have pleaded that he ought not contrary to his will to be compelled to answer in any manner whatever *except by bill* to be exhibited against him as an attorney of this court.

Best, in support of the demurrer, said that the defendant, meaning to avail himself of his plea of privilege as an attorney of this court, had improperly pleaded it in the form of an attorney of *C. B.*; and this being shewn as special cause of demurrer, the Court will not reject it as surplusage. *Barlow v. Evans*, 1 Wils. 99. Pleas in abatement are always construed strictly; *Roberts v. Moor*, 5 Term Rep. 488; and should state a better process. But stating a custom here of forejudging attorneys of their privilege is only calculated to mislead.

Walton, contra, observed that what was unnecessarily stated, in respect to the custom of an attorney of *B. R.* being forejudged of his office, went to narrow and not to extend his privilege, and might well be rejected as insensible and surplusage; there being no such custom known in *B. R.* But as an attorney of this court was not suable at all except by bill; and here the defendant was sued by original: enough appeared, without the surplus matter, to shew that the defendant was entitled to his privilege.

Lord ELLENBOROUGH, C. J. Admitting the general principle, that a plea in abatement to the writ must give the plaintiff a better process, it is sufficient for the defendants to plead that he is an attorney of this court, and as such to claim his privilege not to be sued by original: for we will take notice that an attorney of this court can only be sued by bill. It is true the plea goes on to state something about a custom in this court of forejudging an attorney of his privilege; of which we know nothing: but enough being shewn to support the plea, that which is here added unnecessarily will not vitiate it; as in *Hopkins v. Squibb*, 1 Ld. Ray. 702. And in *Routh et Uzor v. Weddell*, 2 Lutw. 1666. where exception was taken to a plea of privilege by an attorney of *C. B.* that the custom was not stated with sufficient precision, the Court said they would take cognizance of the privileges of the attorneys of the court, and therefore the custom need not be so precisely alleged as other customs.

Per Curiam,

Judgment for the Defendant.

Hussey v. Christie and Others.

9 East, 426. May 17, 1808.

The master of a ship has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage.

THE Lord Chancellor sent the following case for the opinion of this Court.

On the 28th of July 1804, *John Hill*, the owner of the ship *Britannia*, engaged by a written contract the plaintiff *Hussey* as master of her, on a voyage to the *South Sea* fishery. [The case set forth the contract, but nothing turned upon the particular provisions of it. Amongst other things it stated, that *Hill* agreed to allow to *Hussey* for his own services, and also for providing officers and crew for the voyage, one-third of the neat proceeds of the adventure: and that *Hussey* should discharge all the lawful demands which the said officers and men might have on the ship and cargo.] The ship being equipped and provided for the voyage, the plaintiff took the command as master, and sailed from *England* in September 1804, upon the voyage agreed upon, and prosecuted the same with all due diligence; and, having procured a considerable cargo, arrived with the ship at *Port Jackson* in *South Wales* in June 1806; but in consequence of her having met with very severe weather, and sustained much damage, it became impossible to prosecute the voyage further, without considerable repairs at *Port Jackson*. The plaintiff accordingly caused the necessary repairs to be done, and the articles of tackling and furniture wanting to be supplied, and expended a large sum of money for those purposes. But not being able to advance all the money necessary to complete the repairs, he drew several bills of exchange upon *Hill* the owner, for the purpose of raising money to supply the deficiency. Having completed the repairs necessary for bringing the ship and cargo home, the plaintiff set sail from *Port Jackson* for *England*; but in the course of the voyage it became necessary to make further repairs and to procure a new cable; for all which the plaintiff was obliged to draw other bills of exchange on the owner, and also to give his own promissory note. The plaintiff arrived with the ship and cargo in *London* on the 15th of April 1807. During his absence on the voyage, *Hill* the owner became a bankrupt, and a commission was duly issued against him, and some of the defendants were chosen his assignees. None of the bills of exchange mentioned have been paid by *Hill* or his assignees; and some of them have been taken up by the plaintiff, as the drawer, since his return with the ship. Nor has any part of the money expended by the plaintiff in the repairs of the ship and in providing the necessary tackling and furniture been repaid to him. The plaintiff intended and endeavoured to retain the ship in his possession until he had been reimbursed the money expended, and indemnified against the debts incurred by him as aforesaid; but *Hill's* assignees and the other defendants (who claim an interest in the ship or cargo,) or some of them, forcibly took possession of the ship and brought her into the *London* dock. Whereupon the plaintiff filed his bill in Chancery, amongst other things, for an injunction to restrain the defendants from disposing of the ship and cargo until his claim should be first satisfied: and the defendants having put in their answer, the Lord Chancellor directed this case to be stated for the opinion of this Court upon the following question: Whether the plaintiff had any lien on the ship for the money expended or debts incurred by him for the repairs done to her on the voyage?

Scarlett, for the plaintiff, admitting that he had not found any adjudged case at law upon the point, said that it was taken for granted in many cases that the master had a lien upon the ship for the amount of the necessary re-

pairs of it paid or contracted for by him abroad, though not for repairs done in *England*: and he instanced *Wilkins v. Carmichael*, Dougl. 101, *Watkinson v. Barnardiston*, 2 Pr. Wms. 367(a), and *Ex parte Shank and Others*, 1 Atk. 234. All writers agree that the master has a right to hypothecate the ship for repairs made abroad; which seems to proceed on the principle of his having a lien on it for expences so incurred, for which he would be personally liable; for he cannot convey a right to another which he had not himself. [Lord *Ellenborough*. One may have a power, who has no lien or interest in the thing to be conveyed: as an attorney may do an act to bind his principal, without having any interest in the subject-matter.] This case stands on the maritime law, by which the master would be personally liable for repairs ordered by him: and this is recognized by the law of *England* with respect to repairs made abroad: which differs this from the ordinary case of attornies or agents, who when treating as such, within the scope of their authority, are not personally liable. [Lord *Ellenborough*]. The master's liability must depend upon his contract. If he gave notice to the shipwright abroad before he made the repairs that he was to look only to the security of the ship and its owners, the master would not be personally liable.] Perhaps the repairs would not be undertaken without the master's personal security; and if his duty and the interest of his owners oblige him to enter into contracts for their benefit, for which he is personally liable, he ought to have a lien on the ship to indemnify himself; otherwise he will not engage in them, and the ship and whole adventure may be lost. Every lien attaches on the possession of the thing; but the possession is still in the master during the repair; and if he pay the tradesman, it is the same as if he made the repair himself. Then why should he not have a lien as well as another? [Lord *Ellenborough*. Have you any case where an agent has been held to have a lien for work done by others whom he has set to work upon the property of his principal? *Le Blanc, J.* The agent is not the person doing the work.] If the agent undertake personally for it, as between him and his employer, he may be said to do the work. [Lord *Ellenborough*. Do you derive the master's power to hypothecate from his interest in, or his authority over, the subject-matter?] The principle on which such a power is founded is to enable the master to preserve the property in cases of necessity, and the same principle leads to giving him a lien, to encourage him to pledge his personal security for the same purpose. He cannot even hypothecate the ship if he can raise the money wanted without it. The master has clearly a lien on the cargo for the freight, and he is liable to the seamen for their wages: but if the owner may take ship and all from him, there would be an end of his lien.

Marryat, contra. Liens for work done arise out of the usages of trade, and are in derogation of the common law. If the lien in question exist at all, it must be by the usage of trade; but that has never been recognized by any adjudged case, nor has ever prevailed in practice: and no inference can be drawn in its favour from the distribution of assets or of bankrupts' estates, by a court of equity, for the benefit of the master who has laid out money for the use of the ship abroad, where the subject-matter was in the hands of the Court. If the master had ever been considered as having a lien, it would have been mentioned in the books, which acknowledge his right to hypothecate; but the mention of that alone rather excludes any right of lien in himself; and there is no instance of an hypothecation by a master to himself. It is clear that the master has no lien on the ship for his wages(b) at common law; and the decree in his favour in that respect, in *Watkinson v. Barnardiston*, 2 Pr.

(a) In this case the master of the *Rolls*, as it appears by Mr. Cox's note from the registrar's book, held that the money paid to tradesmen for repairs, &c. by the captain abroad was not a lien on the ship.

(b) Vide *Abbott* on merchant ships, &c. 2d edit. 421.

Wms. 367, must have proceeded upon equitable grounds. Nor does it appear that the Master of the Rolls meant to say that he had a *lien*, in the strict sense of the word, in any case; but only that he had a specific remedy *in rem* by process in the Admiralty court: for where there was no possession, as is in that case, there could be no *lien*. Besides, the possession of the master is in all cases the possession of the owners, and not adverse to them. So his lien upon the freight is for the benefit of the owners as against the consignees of the goods. The owners, therefore, taking possession of the ship and cargo, take their own lien for the freight at the same time: nor can the captain prevent them from receiving the freight; for which they may maintain an action in their own names; though the captain may sue in his own name for it. To give the master a lien on the ship would have this bad consequence, that after every voyage the captain would detain possession till his account with his owners was settled; and they would be often obliged to submit to improper charges to avoid the inconvenience and costs of delay.

Scarlett, in reply, said that the law of merchants recognized the principle of the lien in question, and therefore the common law adopted it. The reason why the master cannot sue in the Admiralty for wages, as the seamen may, is because he has a lien for them on the freight which he is entitled to receive; which lien would be defeated if the ship might be taken from him. [*Bayley, J.* The reason given in the books why the master cannot sue in the Admiralty court for his wages is because he has contracted personally with the owner for them.] Though the possession of the ship by the master be for many purposes that of his owners, yet for others he has a distinct possession from them; and may maintain trespass upon it. In *Justin v. Ballum*, Salk. 34, it is said, that by the maritime law every contract of the master implies an hypothecation; though not so by the common law, unless expressly agreed. But many liens, it is well known, have arisen out of the modern usages of trade, and each must have had a beginning and been adopted in some particular case.

Lord ELLENBOROUGH, C. J.. The question sent for our opinion is, Whether in point of law the plaintiff, the master, had any lien on ship for money expended or debts incurred by him for repairs done to her on the voyage; and we must look into the precedents of the common law to enable us to give an answer to it. It is admitted, that there is no case at law where such a lien has been adjudged to exist. And though it be said that there must be a beginning in the case of liens; yet I disclaim the right of originating it now; nor can I, in the absence of all authority, create a lien in a case where none has ever been before allowed, and when every case of lien is against the common law. How then does the law stand in this respect? If the repairs be done here, the owners are liable; though the master may also become liable on his own contract, if he do not stipulate against his personal liability, and confine the credit to his owners. If the necessary repairs be done abroad, the master may hypothecate the ship for them, and it is his own fault if he subject himself to any personal liability, which he may renounce. It is said, however, that because he may hypothecate, he may acquire a lien by taking upon himself the payment of the repairs: for that the persons to whom he hypothecates acquire an inchoate lien on the ship, inasmuch as they are entitled by suit in the Admiralty court to acquire possession of the ship itself. But it does not follow, because others, through the master, and through his hypothecation, may acquire a lien on the ship, that therefore he himself has such a lien. Liens may be derived through the acts of servants or agents, acting within the scope of their employment, which they themselves had not. If a servant deliver cloth to a tailor, to make his master's liveries, the tailor indeed will have a lien on the cloth for the value of his work; but though the servant pay the tailor his charge, that will not give the servant a lien on the liveries. As to the cases in equity, I cannot consider them as professing to lay down

any such rule as that the captain has a lien on the ship for repairs done abroad at his charge: the only difference between repairs done here and those done abroad is, that there he may hypothecate, and here he cannot: and the result of those cases is only that, when done abroad, steps may be taken for procuring an hypothecation, by which the persons making the repairs may acquire a lien on the ship: but we have no authority, sitting here, to originate such a lien(1). The case sent to us involves no question about the master's lien on freight(2), and therefore I shall give no opinion upon it. We will certify our opinion to my Lord Chancellor(3).

On the 30th May 1808, the Court certified, that they had heard the case argued, and were of opinion, that the plaintiff had not any lien on the ship for the money expended or debts incurred by him for the repairs done to the said ship on her said voyage. (Signed)

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

Millson v. King.

9 East, 434. May 17, 1808.

Bail above having been put in and exception entered in the vacation, notice of justification for the first day of the next term must be given *within four days after such exception*.

ON a former day, a rule *nisi* was obtained for setting aside proceedings on the bail-bond for irregularity. The writ was returnable on the return day of *Hilary* term. Bail above were put in, and notice served in vacation, on the 15th of *February*, and notice of exception given on the 26th; and no notice of justification having been given within four days after, the bail-bond was assigned on the 7th of *March*: but on the 2d of *May*, notice was served of adding and justifying bail on the 4th, being the first day of *Easter* term: and the bail did then justify, but it was after this action was brought on the bail-bond.

Andrews opposed the rule, on the ground that where bail above is put in and exception entered in vacation, notice of justification for the first day of the ensuing term ought to be given within four days after such exception; otherwise the bail-bond may be assigned. Here therefore the bail-bond was properly assigned, and the action being regularly brought, the justification of bail was too late.

Lawes in support of the rule said, that by the general rule of practice, if the exception were taken in term time, two days notice of adding and justifying bail would have been sufficient(a); and it was strange that because the exception was taken in vacation, though the defendant had till the first day of the next term given him to justify, he should be obliged to give a longer notice.

(1) In *Gardner & al. v. The ship New-Jersey*, 1 Pat. Adm. Den. 228, it was decided, that the master has a lien on the ship for necessaries supplied by him during the voyage.

(2) It has been decided in this country, that the master has a lien on the freight for his expenses and disbursements. *Lane v. Peasiman & al.* 4 Mass. Rep. 92. *Milward v. Hallett*, 2 Caines, 81, 84. See also *White v. Baring & al.* 4 Esp. 22.

(3) [The master of a ship may maintain a suit in personam in the admiralty, against the owner for his wages, but not in rem against the ship, for he has no lien. *Willard v. Door*, 3 Mason 91. By the maritime law, the master of a ship has no lien upon the ship, even for his wages. *The Steamboat N. Orleans v. Phœbus*, 11 Peters, 178. A master of a vessel has a right to retain freight received by him, in satisfaction of a debt due to him, against a claim by the owner of the ship, or of his assignee, as a general creditor. *Hodgson v. Butts*, 8 Cranch. 140. 158.—W.]

(a) Vide 1 Tidd's Pract. ch. 6. of bail.

And in *Foulis v. Grosvenor*, Barnes, 101, where the exception was in vacation, and the bail were justified on the second day of the next term, the Court, in answer to an objection that the defendant had not justified bail within four days after exception taken, with reference to the rule of E. 5 G. 2.(a), said that two days notice was sufficient; and therefore stayed the proceedings on the bail-bond.

The Court said, that the first day of the then next term given to the defendant to justify his bail, was only given to him *sub modo*, if he gave the due notice: and it appeared by a note of the master of a case determined on the meaning of the rule of *Easter*, 5 G. 2, that if bail were put in and execution entered in vacation, the defendant's attorney must, *within four days after such exception entered*, give notice of justification for the first day of the next term; and no such notice having been here given, the bail-bond was well assigned, and the proceedings regular.

Rule discharged.

Wood v. O'Kelly.

9 East, 486. May 18, 1808.

Where by the rule of reference, *the costs, were to abide the event of an award*, that includes *the costs of the reference as well as of the cause*.

UPON a reference under a rule of court, in an action for work and labour &c., "*the costs (were) to abide the event of the award*": and the master having taxed the costs of the reference, as well as of the cause, *Bowen* objected, upon shewing cause against a rule for an attachment, that *the costs*, directed to abide the event of the award, meant the costs of the cause only, and not of the reference: and upon this he obtained a rule nisi for the master to review his taxation: and mentioned *Tynte v. Every*, Barnes, 68, *Bracher v. Cotton*, Ibid. 123, and particularly *Browne v. Marsden*, 1 H. Blac. 223, and *Bradley v. Tunstow*, 1 Bos. & Pull. 34, where the general term *costs* in a rule of reference was considered not to include the costs of the reference. But on this day, *The Court*, after hearing *Heath* against the rule, and *Bowen* in support of it, held that the master had done right including the costs of the reference in his taxation of costs for the plaintiff, in whose favour the award was made. And they considered that the late cases in *C. B.* turned upon the particular terms of the rules of reference.

Rule for reviewing the taxation of costs discharged.

The King v. Emden.

9 East, 437. May 21, 1808.

One was indicted in *Middlesex* for perjury committed in an affidavit, which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *proust patet* by the affidavit affiled in the Court of B. R. at *Westminster*, &c. and on this he was acquitted: after which he was indicted again in *Middlesex* for the same perjury with this difference only, that the second indictment set out the jurat of the affidavit in which it was stated to have been sworn in *London* which was traversed, by an averment that in fact the defendant was so sworn in *Middlesex* and not in *London*: and held that he was entitled to plead *auterfoits acquit*; for the jurat was not conclusive as to the place of swearing, and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence.

IN *Hilary* term, 48 G. 3, the defendant was indicted in the county of *Mid-*

Middlesex, for that he, maliciously intending to aggrieve one *G. Witherden*, and to cause 1880*l.* to be indorsed on a writ of *capias ad respondendum* issued out of *B. R.* with intent to procure *G. W.* to be arrested to answer the defendant &c. and to compel *G. W.* to find bail for that sum, on the 20th of November 1806, at the parish of *St. Andrew, Holborn*, in the county of *Middlesex*, came before one *F. G.* deputy filacer of the said court for the county of *Middlesex*(a), and the deputy of the officer who should issue such process as aforesaid, and then and there was sworn before the said *F. G.* (the said *F. G.* having competent authority to administer the oath, &c.): and the defendant being so sworn, falsely, maliciously, wilfully and corruptly swore, in substance, that *G. W.* was indebted to him in 1880*l.* for money had and received, &c.: upon and at the foot of which said affidavit in writing, as the same affidavit was and now remains affiled in the said court, &c. (*B. R.*) at *Westminster* aforesaid in *Middlesex*, is written as follows, viz. "Sworn at No. 15, *Furnival's Inn, London*, the 20th day of November 1806, before *Fs. Gordon, Dep. Fil. for Middlesex*;" whereas in fact the defendant was so sworn and made the same affidavit in writing before the said *F. G.* in the said county of *Middlesex*, and not in *London*: and then the indictment proceeded to negative the truth of the affidavit of debt; and concluded, "and so the jurors, &c. say, that the defendant on the 20th of November 1806 aforesaid, at the parish aforesaid, in the county of *Middlesex* aforesaid, upon his oath aforesaid, before the said *F. G.* so then and there being such deputy filacer as aforesaid," &c. did falsely, wilfully, and corruptly commit wilful and corrupt perjury.

The defendant, after cravingoyer of the indictment, pleaded that the King ought not further to impeach him by reason of the premises therein contained, because, &c.: and then he set out a former indictment preferred and found against him on the 7th of April, 47 G. 3, at the general sessions ofoyer and terminer in and for the county of *Middlesex*; which indictment was in all respects the same as the present, except in the omission of the two sets of words before written in italics, and except that immediately after stating the affidavit of debt sworn to by the defendant before *F. G.* these words were added in lieu of the second set of words in italics, "as by the same affidavit affiled in the said court of our said Lord the King of the Bench at "*Westminster* aforesaid in the county of *Middlesex*, amongst other things, "more fully appears." The plea then continued to set forth the record of the former indictment; that it was removed into *B. R.*; and that the defendant afterwards pleaded not guilty, and was tried before the Chief Justice at *Westminster*, &c., and that the jury found the defendant *not guilty* of the premises charged upon him *in manner and form, &c. as alleged*. Whereupon, there was judgment for the defendant: as by the record and proceedings thereof, &c. at *Westminster*, &c. more fully appeared. Which said record still remains in force, &c. And then the plea alleged "that the affidavit in writing set forth in the indictment against the defendant in this plea mentioned, and therein said to be affiled in *R. R.* at *Westminster* aforesaid in the said county of *Middlesex*, and whereupon the supposed perjury charged to have been committed by the defendant therein named was assigned, and of which he was acquitted as aforesaid, and the said affidavit in writing set forth and contained in the indictment now pending against the defendant, now here pleading to the same, and therein also said to be affiled in the *B. R.* at *Westminster*, &c. and whereon the supposed perjury by the said now depending indictment charged to have been committed by the defendant now here pleading is assigned, is one and the same affidavit and not other or different: and that upon and at the foot of the said affidavit in writing in the said indictment in this plea set forth and contained

(a) These and the subsequent words in italics were not in the first indictment hereafter mentioned.

as aforesaid, as the same affidavit then was and remains affiled in *B. R. at Westminster, &c.*, is written as follows, viz. "Sworn at No. 15, Furnival's Inn, London, the 20th day of November 1806, before Frs. Gordon, Dep. Fil. for Middlesex;" whereas the defendant was so sworn and made the same affidavit in writing before the said F. G. in the said county of *Middlesex*, and not in *London*. And then the plea alleged the identity of the memorandum at the foot of the affidavit last mentioned, with the memorandum at the foot of the affidavit mentioned in the indictment now pending, and that the Frs. Gordon mentioned in each is the same, and his authority to administer the oath the same, &c.; and that the several assignments of perjury mentioned in the indictment of which the defendant was before acquitted, and those in the pending indictment, are really and substantially the same assignments of perjury, and the offence charged in the former and in the present indictment is identically one and the same, and that the defendant is the same person charged in both. Wherefore, &c.

To this plea there was a general demurrer and joinder.

Abbott, in support of the demurrer, argued that there was a material difference between the affidavit set forth in the former indictment on which the defendant was acquitted, and that set forth in the present indictment; and relied on such difference to shew that the acquittal on the former prosecution was no bar to this. A former acquittal, he contended, was no bar to a subsequent prosecution, unless the defendant might have been convicted on the first indictment by proof of the facts contained in the second: for which he cited *Vandercom* and *Abbot's case*, East's P. C. 522. tit. burglary, ch. 25. s. 29, in which all the prior cases were considered. Both the indictments there were in fact founded on the same transaction; but in the first they were charged with breaking and entering the dwelling house in the night, and stealing the goods of A. B. and C.; and their acquittal of that charge was held to be no bar to another indictment for breaking and entering the same dwelling house on the same night, *with intent to steal* the goods of A. and B. there. And so it is said in *Vaux's case*, 4 Co. 45. a. that though *auterfois* acquitted or convicted of the same offence be a good plea; yet it is intended of a lawful acquittal or conviction: but when the offender is discharged upon an insufficient indictment, there the law has not had its end, &c. Now here the defendant could not have been convicted on the first indictment by proof of facts contained in the second. For the first indictment stated, that he swore the affidavit, on which the perjury is assigned, in *Middlesex*, and vouched that it would so appear by the affidavit itself affiled in Court; which, though perhaps unnecessary to be stated, made it necessary to prove the allegation by an affidavit which appeared on the face of it to have been sworn in *Middlesex*. Whereas the affidavit stated in the second indictment appears upon the face of it to have been sworn in *London*, though alleged in fact to have been sworn in *Middlesex*. But that shews that the defendant could not have been convicted upon the former indictment. As in *Readings case*, East's P. C. 931. tit. Forgery, c. 19. s. 56, and *Gilchrist's case*, Ib. 982, in forgery, where the instrument was alleged by the indictment to *purport* to be drawn upon A. B., &c. when in fact, though really meant to be drawn upon those persons, it purported to be drawn in the names of C. B., &c., the prisoners were held entitled to an acquittal. So if a deed were made to A. by the mistaken name of B., if it were alleged in an indictment as a deed to A., it would not be proved by shewing a deed to B.: but the proper way is to allege that it was made to A. by mistake there called B. The same in an action on a judgment against A. by the mistaken name of B.; it must be so averred. In *Rex v. Gilbert Gardner*, which was tried before Lord Kenyon at the sittings at Westminster after Mich. term 1791, the indictment was for perjury committed on the trial of an action by A. against B., in which it was averred that A. impleaded B. for an assault upon him when A. was riding with C. and B. was riding with D. Whereas

the record produced was of an action by *A.* against *B.* for the assault generally, without the special circumstances : and it was offered to prove those circumstances by parol : but Lord *Kenyon* would not allow it ; saying that there might be another record of an assault with those special circumstances stated in it ; and therefore he directed an acquittal. So here, there might have been another affidavit answering the description in the first indictment. In *Purcell v. Macnamara*, Ante, 161, Lord *Ellenborough* said, " If it (the allegation in the indictment) had gone on to state that the acquittal was on a certain day, as appears by the record ; that might have been considered as descriptive of the record, and then the variance would have been fatal." The words of reference then in this case made the allegation descriptive of an affidavit which appeared on the face of it to have been sworn in *Middlesex*, which being different from the true affidavit described in the second indictment, the acquittal on the first indictment is no bar to the indictment pending.

The Common Serjeant (Knollys) contra, said, that this differed from *Vaux's* case, and that of *Vandercom* and *Abbott* ; in the first there was a defective allegation of the crime of murder by poisoning ; in the other, the offences alleged in the two indictments were distinct in specie, though of the same genus. And in each of the cases of *Reading* and *Güchris*, the record was at variance with itself ; stating that the instrument purported on the face of it to be that which it did not purport to be. Here, however, the first indictment was good upon the face of it, and in truth and substance charged the same offence as that included in the second. The material averments in the last are, that the affidavit mentioned in the former indictment, and the affidavit set forth in the indictment pending, are one and the same affidavit, and not other or different, and that the memorandum at the foot of the affidavit mentioned in each indictment is the same ; that the assignments of perjury in both are really and substantially the same ; and the same person and the same identical offence charged in each. On the first indictment it would have been sufficient to have proved, that in fact the affidavit was sworn in *Middlesex* ; but even if it were otherwise, the burthening the prosecutor with the proof of an unnecessary averment, which failed, would not warrant the putting of a defendant in jeopardy again upon another indictment in the same county and for the same offence in substance. The very object of the stat. 23 Geo. 2. c. 11. s. 1. was to render prosecutions for perjury more easy, by making it sufficient to set forth the substance of the proceedings together with proper averments of the fact : but if by stating more than is necessary of the substance of the proceedings, and failing in the proof of an unnecessary allegation, the prosecutor could institute another indictment for the same offence, the statute would be made an engine of oppression. The plea of *autrefois acquit* is not confined to cases where the second indictment is in the same identical form as the first. If a prisoner be indicted for the murder of one *unknown*, and be acquitted ; to another indictment for the murder of *A. B.*, he may plead his former acquittal, and aver that *A. B.* named in the second indictment was the person before said to be *unknown*. Dy. 285. a. and Staunf. A. C. 105.(a). The only new fact alleged in the present indictment is, that at the foot of the affidavit there was a certain memorandum stating it to have been " sworn at No. 15, Furnival's Inn, London," &c. but by whom written, whether by any person having competent authority to put it there, does not appear.

The Court, having asked *Abbott* what answer he had to make to the last observation ; and he saying that it appeared to be so stated in the jurat, which was a necessary part of the affidavit, of which the Court would take judicial notice ; they observed that the memorandum was not stated to be the *jurat* ; it only appears to be written before the affidavit was filed, but it does not appear

when that was filed. Neither do the rules of the court require the *place* where the affidavit is sworn, but only the names of the deponents, to be stated in the jurat: though in fact it is stated where the affidavit is sworn, whether in court, or at the Judge's chambers.

Abbott replied, that the Court would take notice of their own practice in stating the place where an affidavit is sworn, though not required by any written rule of Court, and, unless the place had been stated, he doubted whether any Court would have received the affidavit. *Bayley*, J. however said, that in a late case in *C. B.* it was considered that the place where the affidavit was sworn was not necessary to be stated in the jurat. And he asked whether it were meant to be contended that a defendant could not be indicted for perjury committed in an affidavit, without stating the jurat: and if not, whether the stating at the foot of the affidavit, that it was sworn at a certain place, made the place part of the issue? In an action on a bond, it is stated that the bond was executed at such a place; but the place is no part of the issue. *Abbott* admitted, that it was not necessary in an indictment for perjury in an affidavit to state the jurat, the stat. 23 Geo. 2. having made it sufficient to set forth the substance of the proceedings. But, in answer to the other question, he observed that in an indictment for perjury the place was material to be laid and proved, which it was not in the case of an action on a bond.

LORD ELLENBOROUGH, C. J. It appears to me that the jurat is not a necessary part of an affidavit to be stated in an indictment assigning perjury in such affidavit: it is only necessary to state so much of it as constitutes the crime; namely, that which contains the false oath, together with the averments proper to substantiate the perjury. If so, there was a sufficient indictment found in the first instance, on which the party has been tried and acquitted of the same offence as is now charged by the second indictment; and therefore such acquittal is a good plea in bar to the present indictment. It is quite a different question whether a party producing an affidavit, which appears on the face of it to have been sworn in *London*, and proving it to have been sworn elsewhere, is fit to be believed; that would be a question for the jury: but on the record of the first indictment the offence was sufficiently charged without setting forth the jurat, by which it is stated to have been sworn in *London*: and the production of that jurat on the trial of that indictment would no otherwise have affected it, than as it affected the credit of the person swearing to the fact of the affidavit having been sworn in *Middlesex* where the trial was had. The whole crime therefore might have been tried on that indictment, and the defendant was in jeopardy upon it, and consequently his acquittal is a bar to the present prosecution.

GROSE, J. declared himself of the same opinion.

LE-BLANC, J. The first indictment was sufficient in the frame of it, and is the same in effect as the indictment now pending, except, in not stating the jurat: and unless the jurat be a necessary part of the affidavit to be stated in an indictment for perjury assigned on such affidavit, which I think it is not, the difference between the two indictments is not material. Then the second indictment set forth the jurat, which states that the affidavit was sworn in *London*, with an averment that the defendant was sworn and made the affidavit in *Middlesex*, and not in *London*. But that averment does not let in the proof of any fact that might not have been given in evidence on the first indictment: how credible, it is not necessary to inquire. Therefore the defendant, having been in jeopardy upon that indictment for the offence with which he now stands charged, is entitled to plead his former acquittal in bar.

BAYLEY, J. The present indictment itself supposes that the jurat is not conclusive evidence of the place of swearing the affidavit, because it expressly avers that it was sworn in *Middlesex* and not in *London*, as set forth in the jurat. Then if the jurat be not conclusive as to the place, the same evidence

would have supported the first indictment as would be required to support the second; and therefore the defendant having been once in jeopardy for this offence, his acquittal is conclusive(1).

Judgment for the defendant.

Marshall v. Critico.

9 East, 447. May 23, 1808.

One who had been appointed Consul General from the *Porte*, but was dismissed several months before from his employment, and another person resident here appointed in his room, is not at any rate privileged from arrest, though at the time of the arrest he had not received any official notification of the dismissal or of the appointment of the other.

BURROUGH moved to discharge the defendant from an arrest on filing common bail, on the ground of his privilege, under the stat. 7 Ann. c. 12, as being consul general from the *Porte*, and invested with a superintending authority over the *Turkish* consuls in the different sea port towns, and not an ordinary consul or agent for commercial purposes; in which respect he distinguished this from *Barbui's* case(a). But he also stated from the affidavit, that some months previous to the arrest, the defendant had in fact been dismissed from his employment, and another person of the name of *Natali*, who was before residing here, had been appointed in his place; but the defendant had then received no official notification of his dismissal, and continued in fact to exercise his office here until after the arrest. And he contended that the defendant's privilege did not cease until notification at least of his dismissal, and reasonable time to depart the kingdom if he thought fit. It did not however appear that he had had any intention of departing.

Lord ELLENBOROUGH, C. J. This is not a privilege of the person, but of the state which he represents. And that state having some months before divested him of the character in which he claims the privilege, and appointed another person here to exercise it; there is no just reason why the defendant should not be subject to process as other persons; nor for the state, by which he had been so dismissed from his employment, to take offence at his arrest.

Per Curiam,

Motion denied.

Doe on the demise of Belasyse and Lady Charlotte Wynn Belasyse, his Wife v. The Earl and Countess of Lucan.

9 East, 418. May 24, 1808.

One having a freehold manor of *Sutton*, and freehold lands there, and having also copyhold within the township of *Sutton*, and within the local ambit of the manor, but held of another manor; and having surrendered his copyhold to the use of his will; devised all his manor of *S.*, and all his messuages, farms, lands, tenements, and hereditaments whatsoever within the precincts and territories of *S.* in the county of *Chester*, with their rights, members, and appurtenances in trust for his daughter *L.*, (having devised other estates in other counties to two other daughters) and to her children in strict settlement: held, 1. That farms, lands, &c. within the township, though not within the manor, of *Sutton*, passed by the description of farms, &c. within the precincts and territories of *S.* 2. That the general words "messuages, farms, lands," &c. and particularly the word *farms*, were sufficient to carry copyhold as well as freehold in the place described, if such appear to be the intent of the testator upon the whole will. 3. That such intent was evinced in this case by the word *farms*, where it appeared that the testator had a farm composed of copyhold and freehold, which he had let as one entire subject, and which must otherwise be di-

(1) Vide *The People v. Barrett & al.* 1 Johns. 77. *The People v. Olcott*, 2 Johns. Ca. 301. *The State v. Woodruff*, 2 Day 504.

(a) Cas. temp. Talb. 281., and vide *Lord Mansfield's* account of the same case in *Triquet v. Bath*, 3 Burr. 1480—1.

vided ; and also by this, that he had charged the property devised beyond the annual income of it, unless the copyhold were included. And that this intent was not rebutted by a power of leasing for 21 years given to all the tenants for life ; nor by power to the trustees to raise portions by grants of long terms of years. 4. That a small copyhold distant eight miles, and a small freehold 20 miles from *Sutton*, but within the county of *Chester*, did not pass by that devise, but did pass under a general residuary clause to another daughter.

IN ejectment for copyhold or customary lands, part of which are locally situated within the township and freehold manor or reputed manor of *Sutton*, and part in the township of *Kettleshulme*, without the manor of *Sutton* ; all of which copyhold or customary lands are held of the manor and forest of *Macclesfield* ; and also for freehold lands in the parish of *Northwich* in the same county, and not within either of the said manors ; a verdict was taken for the plaintiff, at the trial at *Chester*, subject to the opinion of this Court upon the following case.

Henry late-*Earl of Fauconberg*, being seised in fee of the freehold manor of *Sutton*, and of divers freehold lands and premises within the manor ; and being also seised in fee of the freehold premises in *Northwich* ; and being entitled in fee simple, according to the custom of the said manor and forest of *Macclesfield*, to all the said copyhold or customary premises ; which several freehold and copyhold or customary premises formed the whole of his estate in the county of *Chester* : and being also seised in fee of divers other large freehold, but no copyhold, estates, in the counties of *York*, *Durham*, and *Middlesex* : and having no male issue, but having three daughters, viz. *Lady Charlotte Wynn Belasyse*, one of the lessors of the plaintiff, *Lady Wombwell*, wife of *Sir George Wombwell Bart.*, and *Elizabeth* Countess of *Lucan* one of the defendants : and having surrendered all his copyhold estates to the uses of his will : by his will duly executed, dated the 26th of *November 1801*, devised certain freehold estates in *Yorkshire* and *Middlesex*, being the bulk of the property, to trustees for a term of years, in trust to raise and pay to *Lady C. W. Belasyse*, for her separate use, an annuity of 1000*l.* per annum for her life ; remainder to herself for life ; remainder to her first and other sons successively in tail ; remainder to her daughters, as tenants in common in tail ; with divers remainders over. And also devised other freehold estates in *Yorkshire* and *Durham*, as follows.—As to all and singular the manors or reputed manors of *Yarm*, *Old Byland*, *Over Silton*, and *Lund*, and all my messuages, farms, lands, tenements, and hereditaments whatsoever, within the precincts or territories of *Yarm*, *Old Byland*, *Over Silton*, *Nether Silton*, *Leek* and *Lund*, in the North Riding of the county of *York* and *Kenknowle* and *Copycrook* in the county of *Durham*, with their respective rights, members and appurtenances, I devise the same unto *Lord Viscount Melbourne* and *Sir George Wombwell Bart.* their executors, &c. for 99 years, if *Lady Anne Wombwell* shall so long live ; in trust out of the rents and profits of the said manors and hereditaments, to raise 500*l.* per ann., clear of all deductions, for *Lady Anne Wombwell*, for her separate use, &c. ; remainder to the said *Lady Anne* for life ; with divers remainders over. And also devised as follows—As to all and singular the manor or reputed manor of *Sutton*, and all my messuages, farms, lands, tenements, and hereditaments whatsoever, within the precincts or territories of *Sutton* in the county of *Chester*, with their rights, members, and appurtenances, I give and devise the same to *Lord Viscount Melbourne* and *Sir G. W. Bart.*, their executors, &c. for 99 years, if *Lady Lucan* shall so long live ; in trust out of the rents and profits of the said manor, hereditaments and premises, to raise and pay 500*l.* per ann., clear of all deductions, to *Lady Lucan* for her separate use, &c. ; remainder to the use of *Lady Lucan* for life ; remainder to her first and other sons by the *Earl of Lucan* successively in tail ; remainder to her daughter as tenants in common in tail ; and divers remainders over ; and the ultimate remainder, as to the whole of the said estates, to the use of the testator's own right heirs. And the testator empowered the several tenants for life, male or female, in posses-

sion and of age, to limit 500*l.* per ann. for life, clear of all deductions, for the use of any person or persons with whom they might respectively intermarry, to be charged upon the said manors and other hereditaments to them respectively devised, and secured by the usual powers of distress and entry, &c. And also that such tenants for life should have power to charge all or any part of the manors and other hereditaments to them respectively devised with portions for younger children, not exceeding 24,000*l.* for the younger children of Lady C. W. *Belasyse*, and 10,000*l.* respectively, for the younger children of Lady A. *Wombwell* and Lady *Lucan*, with interest not exceeding 5 per cent., &c. And for this purpose to limit or appoint all or any part of the hereditaments so to be charged to any persons for any term of years, without impeachment of waste. The testator also directed that the several tenants for life should have power to limit and appoint the said lands and other hereditaments, or any part thereof, with their appurtenances, by way of lease or demise for any term or number of years not exceeding 21 years in possession, at the best rent, &c. And also gave power to the same to grant building leases, &c. for any term not exceeding 99 years in possession, at the best rent, &c. The testator also directed that Lady C. W. *Belasyse*, and the several manors and hereditaments first limited in use for her life, with remainder to her first and other sons, and daughters, in tail, should be subject to, and should actually exonerate the several other hereditaments, manors, and premises so as aforesaid originally limited in use to Lady A. *Wombwell* and Lady *Lucan* and their several and respective sons and daughters in tail, from land tax, modus, rent, fee-farm rents, prescript rents, curates' stipends or salary, and pensions to poor widows, and all such other incumbrances as were then actually charged thereon and payable by him, and also from the salary of the receiver of rent of the said estate devised to Lady *Lucan*. And the testator devised all the rest, residue, and remainder of his real and personal estates whatsoever and wheresoever, except those he held on mortgage or upon any trusts, unto Lady C. W. *Belasyse*, her heirs, &c. and died on the 23d of March 1802. The testator was not, at the time of making his said will, seised of any other real estates than those before mentioned. After his death Lord and Lady *Lucan* entered into and continue in possession of all the freehold and copyhold premises, for which this ejectment was brought. The case then stated the presentment of Earl *Fauconberg's* will by the homage at the manor and forest court of *Macclesfield*: and the admission of Lord *Melbourne* and Sir *Geo. Wombwell* to the said copyhold or customary premises locally situated within the township and freehold manor or reputed manor of *Sutton*, and also to the copyhold or customary premises situate in the township of *Kettleshulme*, to hold for 99 years if Lady *Lucan* so long lived. That the manor of *Sutton*, and the freehold lands situated within that manor, devised to the defendants, were at the time of making the will, of the annual value of 800*l.* and upwards; and the copyhold or customary lands at *Sutton* were then also of the annual value of 800*l.* and upwards; and that the freehold lands at *Northwick* were then of the annual value of 19*l.*; and the copyhold or customary lands at *Kettleshulme* were then of the annual value of 39*l.*: and that one modus of 4*l.* per annum, payable to the impropriator of the parish of *Prestbury*, covers as well the freehold lands at *Sutton*, as 700 acres of the copyhold or customary lands there. Part of the above-mentioned copyhold or customary estates at *Sutton* and *Kettleshulme* were purchased of the testator's father, *Thomas Lord Fauconberg*; and they, as well as the freehold estates within the manor of *Sutton*, were enjoyed by the testator and his father during their respective lives. At the time of making the will one *John Grimsditch* held a farm at *Sutton* consisting of 261 A. 2 R. 9 P., of which 200 A. 24 R. 0 P. are freehold, and 61 A. 1 R. 24 P. are customary or copyhold land, under a lease granted to him by the testator for the term of 21 years from Lady-day 1789; but since the testator's death *John Grimsditch*

has surrendered the term thereby granted. *Kettlethulme* is distant eight miles, and *Northwich* is distant 20 miles from the extremity of the manor and township of *Sutton*. The lessors of the plaintiff were previously to the commencement of this ejectment duly admitted to all the copyhold premises comprised in the ejectment at the manor and forest court of *Macclesfield*. There are no copyhold lands held of the manor of *Sutton*. The question for the opinion of the Court was, Whether the lessors of the plaintiff were entitled to recover the freehold and copyhold estates, or any and what part thereof?

Benyon for the plaintiff. The question principally arises on the devise to trustees for the benefit of Lady *Lucan* and her issue of "all and singular the "manor or reputed manor of *Sutton*, and all my messuages, farms, lands, "tenements, and hereditaments whatsoever within the precincts or territories "of *Sutton*, in the county of *Chester*, with their rights, members, and appur- "tenances." The property of the devisor contended by the defendants to come within the above description is, 1. The manor of *Sutton*, and a freehold estate within that manor of about 800*l.* a-year. 2. A copyhold estate of the same value, locally situated within the ambit of the township and manor of *Sutton*, though no part of that manor, but parcel of the manor and forest of *Macclesfield*. 3. A small copyhold at *Kettlethulme* within the manor and forest of *Macclesfield*. And, 4. a small freehold in *Northwich*, not within either of the manors. As to the 1st, the lessors admit that the manor of *Sutton* and the freehold estate within that manor passed to Lady *Lucan* under the clause above mentioned. 2dly, The copyhold estate within the ambit of *Sutton*, but parcel of the manor and forest of *Macclesfield*, did not pass by that clause; first, because it is not "*within the precincts or territories of Sutton*," by which must be understood the manor of *Sutton*; and therefore not within the description of the thing devised. If it had been said "*within the precincts and territories of the manor of Sutton*," the meaning would have been clear not to pass this copyhold, which is no part of that manor, but parcel of the manor and forest of *Macclesfield*; according to 2 Roll. Rep. 236. and 16 Vin. Abr. title Manor, C.; and the ambiguity only arises, because there is a township, as well as a manor of *Sutton*; but in no part of the will does the testator allude to the township of *Sutton* by name. Under this description nothing can pass within the ambit of *Sutton*, which is not also within the manor, though the copyhold was occupied conjointly with the freehold: as in *Doe v. Greathead*, 8 East, 91. [*Le Blanc*, J. That was a devise of lands confined by the description to one county, which was held not to include other lands in the same manor which were in another county. [Lord *Ellenborough*, C. J. The testator in the preceding clause of his will speaks of lands, &c. "*within the precincts and territories*" of places distinct from the manors there mentioned; which shews that he meant something unconnected with manors. Can you with effect contend that the copyhold within the ambit of *Sutton* did not pass?] There is another reason why this copyhold did not pass by the general description of lands, &c. because there is a freehold estate to answer the description; in which case the rule of law, as laid down in *Rose v. Birtlett*, Cro Car. 203, in respect of leasehold applies; namely, that the freehold only shall pass under the general words lands, &c. And this is confirmed in *Lindopp v. Eboratt*, 3 Bro. Ch. Cas. 188, and in *Thompson v. Lawley*(a): and copyhold is of less interest in law than leasehold. [*Grose*, J. Where the intention is left doubtful upon the words of the will, that argument would have weight; but not where there is an apparent intention to pass the copyhold. Lord *Ellenborough*, C. J. The testator never once mentions copyholds in his will but only uses general words: and can we suppose that in each instance he meant to separate his copyhold

(a) 2 Bos. & Pull. 308, and 5 Ves. jun. 476, and vide the same question discussed as to copyholds in *Doe v. Vernon*, 7 East, 20.

from his freehold? Does it not appear that he intended every thing to pass within the ambit of *Sutton*?] The will appears to have been drawn by one who understood the legal effect of words: and the testator gives power to the trustees to limit terms of years for raising portions; and to the tenants for life, to lease for 21 years, &c.; powers which are inapplicable to copyholds. If then the copyhold did not pass under the first clause, it passed to the lessor in fee under the residuary devise; in which general words are sufficient to pass copyhold according to *Doe d. Pate v. Davy*, Dougl. 716. note. pl. 12. *Car v. Ellison*, 3 Atk. 73, and *Andrews v. Waller*, 6 Vin. Abr. 237. Copyhold, W. e. pl. 12: and for this purpose the surrender to the use of the will was necessary. 3dly and 4thly, As to the small copyhold at *Kettlethulme*, and the small freehold in *Northwich*, it is clear they could not pass by the first clause, being without the ambit of *Sutton*; and therefore they passed under the residuary clause.

Richardson, contra. The most material question is upon the copyhold within the precinct or territory of *Sutton*; which description cannot be confined, as contended, to lands within the manor of *Sutton*. Lands within the ambit of one manor may be parcel of another manor: and the knowledge of that circumstance in the particular instance by the testator accounts for the generality of the description of the lands, as lying with the precinct or territory instead of saying the manor of *Sutton*. And this is the stronger as he had before named the manor. The legal import of any place described by name, without more, is that it is a township. But it is said next, that the general words, *lands, &c.* in the first clause, there being *freehold* to answer the description, will not pass *copyhold*, even where it has been surrendered to the use of the will: but the cases in equity, which were decisions not merely on equitable points, but on questions whether the legal estate passed, shew that the rule is not general; but that where copyhold has been surrendered to the use of the will, it will pass as well as freehold by general words: as *Hasslewood v. Pope*, 3 P. Wms. 322; which though it was a devise for payment of debts, yet the judgment did not turn on that consideration: and *Tendril v. Smith*, 2 Atk. 85, and *Goodwyn v. Goodwyn*, 1 Ves. 226, where the point was ruled generally, upon the words "messuages, lands, tenements, and hereditaments." In addition to which the will in question has the word *farms*. In *Byas v. Byas*, 2 Ves. 164, the copyhold was held not to pass by general words only, because it was not surrendered to the use of the will. The situation of the testator's family, the local situation of this property, and the disposition of the rest of his estate, all shew his intention to pass the copyhold in question by the general words used to Lady *Lucan*. He had three daughters and no male descendant: to the eldest he gave the bulk of his estates, lying in *Yorkshire*, and the property in *Grosvenor Square*: to the second, a considerable estate in *Yorkshire*, lying at a distance from the former, together with another estate in *Durham*; to Lady *Lucan*, his other daughter, he gave his estates in *Cheshire*, containing the manor of *Sutton*, and also his *farm, lands, &c.* within the precincts or territories of *Sutton*, with their "rights, members, and appurtenances." The subsequent clauses, charging the property devised to the eldest daughter with certain payments of land tax, receiver's salary, &c., were evidently for the purpose of equalizing this distribution a little more in favour of the younger daughters: it is therefore highly improbable, that when the testator made no distinction in terms between his freehold and copyhold, which were held and enjoyed by him together as one estate, and partly leased together, and which were subject to the same modus and charges; he should still have meant to sever the copyhold from the freehold in favour of his eldest daughter, to whom he had before given the bulk of his property situated at a great distance. 3dly, and 4thly, These observations will in part apply also to the two small farms, in the vicinity of *Sutton*; namely, the copyhold at *Kettlethulme*, 8 miles off, of the annual value of 39*l.*, and the freehold at

Northwich, 20 miles off, worth 19*l.* per ann.: which might be considered as *appurtenances* to the *Sutton* estate, and would certainly be included with it in the charge of the receiver's salary, which was thrown upon the property devised to the eldest daughter, in exoneration of that devised to the younger daughters. In *Cro. Eliz.* 113, a devise of a tenement, *with the appurtenances*, in which *H. B. dwelleth in Ebley*, was held to pass land *appurtenant*, though it were out of *Ebley*. [Lord *Ellenborough*. There is nothing stated here to shew that these farms were enjoyed as *appurtenant* to the property in *Sutton*; one was 8, and the other 20 miles apart from it. The property devised to Lady *Lucan's* trustees may not possibly be sufficient, without these farms, to defray the contingent charges upon it, which are 500*l.* a-year clear of all deductions for herself, the like annuity for her husband, and 10,000*l.* for younger children, with interest at 5 per cent. [*Le Blanc, J.* The intention of the testator to include these farms may be probable enough; but the difficulty is to find any words in the will capable of carrying them.]

Benyon in reply, as to the great copyhold in *Sutton*, (to which alone his attention was called by what had fallen from the Court) observed with respect to the cases in equity, where general words had been held to carry copyhold, that they turned either upon devises in favour of creditors; or upon questions between heir and devisee, where when the heir elected to take something devised to him under the will, a court of equity would oblige him to conform to the general directions of the will in favour of the other devisees. *Hazlewood v. Pope*, 3 P. Wms. 322, was a devise in favour of creditors; in which case, a surrender shall be supplied. But in *Lindopp v. Eborall*, 3 Bro. Chan. Cas. 188, Lord Chancellor would not supply a surrender even in favour of a child which was otherwise provided for. It does not appear how the question arose in *Tendril v. Smith*, 2 Atk. 85; but the generality of the proposition there said to be laid down is against the whole current of authorities. And in *Goodwyn v. Goodwyn*, 1 Ves. 226, there were introductory words, shewing a general intention in the testator to pass *all* his estate. No inference can arise of such an intention here in favour of Lady *Lucan* from the surrender to the use of the will, because that was necessary to pass the copyhold by the residuary devise. Nor can it arise from the charge on Lady *C. W. Belasyse* to pay the salary of the receiver for Lady *Lucan*; for it does not follow from thence that *all* the property in *Cheshire* was to pass to the latter. Then the power of leasing, &c. affords a much stronger argument against the testator's intention to pass the copyhold by the first clause, than that derived from the value of the estate devised to Lady *Lucan* in support of such intention: for the charges need not all be laid on at once.

LORD ELLENBOROUGH, C. J. Sufficient appears upon the face of the will to satisfy me, without doubt, of the intention of the testator to give to Lady *Lucan* the copyhold within the township of *Sutton*. The testator was seised of three principal estates, partly freehold, partly copyhold; and had three daughters: and having surrendered his copyholds to the use of his will, he devised the bulk of his property lying in the North Riding of *Yorkshire*, together with what he had in *Middlesex*, to Lady *Charlotte*. Another estate in the North Riding at a distance from the first mentioned, together with that in *Durham*, he devised to Lady *Anne*. He had a third estate in *Cheshire*, the principal part of which is in *Sutton*, and the rest consisted of two detached small farms, the one eight, the other 20 miles from *Sutton*; and he devised to Lady *Lucan* and her family "all and singular the manor or reputed "manor of *Sutton*, and all my messuages, farms, lands, tenements and here- "ditaments whatsoever *within the precincts or territories of Sutton* in the "county of *Chester*, with their rights, members, and appurtenances." The "principal question is, whether the copyhold within the township, but not parcel of the manor of *Sutton*, passed by this devise to Lady *Lucan*? For if not, the testator having given to Lady *Charlotte* all the rest and residue of

his real estates, it is clear that the residuary clause would carry every thing, copyhold as well as freehold, which he had not before devised. In construing the devise in question I shall proceed merely on the testator's intention as I collect it from the face of the will; for I am afraid to look at any argument of intention to be derived from the surrender to the use of his will; though perhaps it may be proper to be regarded even in this Court, as it certainly would be in another Court: but it is not necessary for me to give any opinion upon that point: for I profess to determine this case upon the intention, as collected from the words of the will only. The words of the clause are general, and whatever those words may legally comprehend is, and was, I think, meant to be given to Lady *Lucan*. First, he gives her his manor or reputed manor of *Sutton*. Then he gives her all his messuages, *farms*, lands, tenements, and hereditaments whatsoever, not within the *manor*, but *within the precincts or territories of Sutton*. If the words "lands, tenements, and hereditaments" only had been used, I admit that they would be confined to that which has been construed to be the natural and legal sense of those words; namely freehold, if the intention of the will could be satisfied by applying them to freehold only: but if the intention of the testator could not be satisfied without extending the words to copyhold, then they would comprehend both. Here, however, there are other words; "*farms*," "with their appurtenances." Why may not *farms* include copyhold as well as freehold? But out of all the words used I would look to see what must have been the intention of the testator. Upon a freehold estate of 800*l.* a-year, it must be contended by the plaintiff's counsel, that the testator meant to charge 500*l.* a-year for the separate use of Lady *Lucan*, and 500*l.* a-year interest for younger children's portions, without looking to the contingent additional charge of 500*l.* for her husband. The fund would then be short and defective for the purposes which he had directly in his contemplation. Can such an intention then be reasonably imputed to the testator, and from what words of the will are we to collect it? The words used are general; the word *farms*, at least, would include copyhold as well as freehold; and I should think that even *lands, tenements, and hereditaments* might include both, if such a construction were necessary to give effect to the apparent intention of the testator; and here his intention, as it appears from the charges which he has laid upon the property devised to Lady *Lucan's* trustees, cannot be satisfied without giving the word *farms* at least this interpretation. Then I see no ground for restraining the sense of the general words, "*within the precincts and territories of Sutton*," to the *manor of Sutton*. The contrary intention is, I think, to be collected from the testator's first mentioning the *manor of Sutton*, and then extending his description of the property devised to *all his messuages, farms, lands, &c. within the precinct or territories of Sutton*. And this is confirmed by the former clause of devise to Lady *Anne*, where, after mentioning certain manors by name, he goes on to describe other messuages, farms, lands, &c. *within the precincts or territories* of places not coming within the description of the manors before mentioned. Therefore, construing one part of the will by the other, it appears to me that the description of the *manor of Sutton* does not over-ride the whole clause, but that by *the precincts and territories of Sutton* in the latter part of it, the testator meant the *township of Sutton*. Founding my opinion, therefore, upon the apparent intention of the testator as I collect it from the words of the will, coupled with the facts of the case to which those words apply, I think that the copyhold within the township of *Sutton* passed by the clause in question to Lady *Lucan*. But the two small farms, the one copyhold, the other freehold, lying out of *Sutton*, will pass by the residuary clause; not being comprised within any of the words of description of the prior clause. I lay no stress on the subsequent clause respecting the charge of the receiver's salary, or the modus which covers the copyhold as well as freehold land in *Sutton*.

GROSE, J. Both from the words of the devise and from the apparent intention of the testator on the whole of the will, I think that the copyhold in *Sutton* passed to Lady *Lucan's* trustees; and that the other small estates out of *Sutton* passed by the residuary clause. I do not rely on the surrender to the use of the will: though I think it would be extraordinary if that were to pass copyholds to the lessors of the plaintiff, and not the copyhold in *Sutton* to the defendants. But here are words large enough to comprehend the copyhold as well as freehold in *Sutton*, namely, messuages, farms, lands, &c. within the *precincts and territories of Sutton*; and the intention to pass the copyhold there is quite clear for the reasons which my Lord has stated, and which it is not necessary to repeat. And though it has been argued from authorities, that general words in a will shall not be construed to carry copyhold where there is freehold to satisfy them under the same description; yet that must be understood of cases where there is no apparent intention to pass the copyhold; which is clearly otherwise in the present case.

LE BLANC, J. As to the small copyhold and small freehold lying out of *Sutton*, whatever one's belief may be as to the testator's intention to devise them to Lady *Lucan*, they cannot pass to her, because there are no words sufficient to include them. But as to the copyhold within the township of *Sutton*, the situation of the testator in respect of this property is fit to be considered. He had surrendered his copyholds to the use of his will; and, so far, they were devisable property. He had let a considerable part of the copyhold in *Sutton*, together with the freehold there, to a farmer; and therefore he was at the time of making his will possessed of a farm in *Sutton*, consisting of both copyhold and freehold, let for 21 years. So circumstanced he devises to Lady *Lucan* his manor of *Sutton*, and all his messuages, farms, lands, within the precincts and territories of *Sutton*, with their rights, members, and appurtenances. Now taking it for granted, for the present, that a devise, simply, of lands, tenements, and hereditaments, where there is freehold to answer the description, will not pass copyhold; yet the question is, Whether the Court do not see a manifest intention of the testator in this case to pass the copyhold in *Sutton*? First, he gives to Lady *Lucan* the manor of *Sutton*; and then he gives all his messuages, farms, lands, &c. within the *precincts and territories of Sutton*, not saying within the manor, &c. We must therefore take it, that by the change of expression he meant something more than the manor, which must be the township of *Sutton*. In addition to that I cannot but think that when, having a farm consisting of freehold and copyhold, which latter was within the township, but not within the manor of *Sutton*, he gives all his farms and lands, &c. in *Sutton*, he must have meant to pass both the copyhold and freehold lands within *Sutton*. Then again when it is considered that he had only freehold in *Sutton* to the amount of 800*l.* per annum, I cannot think that he meant to devise that alone, limited too as it is in strict settlement, when he lays such large charges upon it; 500*l.* a-year to Lady *Lucan*, and 10,000*l.* for younger children, with power to her to charge the estates with 500*l.* per annum for her husband. The amount of these charges afford a strong argument, when we are considering the intention of the testator, to shew that he meant to include the copyhold as well as freehold in *Sutton*.

BAYLEY, J. If it had been necessary to decide whether the general words, "lands, tenements, and hereditaments," would pass copyhold as well as freehold, without other circumstances to shew an intention to include both, I should have desired time to look into the authorities; but I think there are circumstances in this case which clearly evince such an intention. For, first, the testator had an undivided farm, consisting of freehold and copyhold; and if he did not mean to pass both, it must be divided. Therefore when he uses the word *farm*, which applies to the entire subject, it raises a presumption that he did not mean to divide it. Then the charges which he has laid upon the

property devised would be greater than the amount of the freehold alone ; which is another circumstance to shew his intention to include the copyhold in *Sutton*. As to the smaller estates of copyhold and freehold lying out of *Sutton*, there are no sufficient words to pass them to Lady *Lucan*, and therefore they will pass to the lessors under the residuary clause.

Postea to the Lessors of the Plaintiff as to the small freehold and small copyhold estate out of *Sutton* ; and to the Defendant as to the rest of the property.

The King v. Young.

9 East, 466. May 25, 1808.

It does not appear that the freemen and livery men of *London* are exempted from being impressed for the sea service, if in other respects fit subjects for that service.

GARROW moved for a writ of *habeas corpus* to bring up the defendant, a waterman and lighterman on the *Thames*, who had been impressed, for the purpose of his discharge ; on affidavits stating that he was a freeman and livery man of the city of *London*, and as such claimed to be exempted from being impressed by reason of certain charters of Ed. 2. and Ed. 3., confirmed by act of parliament and by the usage, in that behalf. And he referred to the instance of one *Millachip*, a freeman and livery man of *London*, who having been impressed in 1777, applied for a writ of *habeas corpus* for his discharge on the ground of his privilege ; and pending the inquiry, was discharged by order of the admiralty. And upon a similar application to the Court of C. B. in 1792, from another livery man who had been impressed, a similar result took place.

The Court, however, after hearing those parts of the charters read which were referred to in the affidavits, and which certainly did not contain any exemption from the service in question in distinct terms, but rather seemed to refer to an exemption of the citizens in those times from being drawn out by the King to serve as soldiers *extra civitatem*, refused the writ : Lord *Ellenborough* C. J. saying, that there did not appear to be any foundation for the exemption claimed from a service, which this description of persons in every part of the country were equally bound to give in their avocation for the defence of the realm, when necessity called for it.

Rule denied.

The King v. The Sheriff of Surry, in the Cause of Morris v. Duffield.

9 East, 467. May 25, 1808.

Where the rule for an attachment against the sheriff for not bringing in the body was obtained on the 11th of *February*, which attachment was returnable on the 4th of *May* ; and the plaintiff did not issue the attachment till the 3d of *May*, and in the mean time the defendant became bankrupt on the 19th of *March*, by which means the sheriff lost his opportunity of paying the debt, and proving it under the commission ; the attachment was set aside for such laches.

THE action was by original, and the special *capias* issued on the 21st of *January* last, returnable on the first return of *Hilary* term, and indorsed for bail 8*l.*, on which the defendant was arrested and gave a bail-bond. And on the 2d of *February*, notice of bail above was given, and exception taken on

the 3d, and a rule on the sheriff to bring in the body served on the same day, which expired on the 9th; and the bail not having justified, the rule for an attachment was obtained on the 11th *February*; but the attachment not being returnable till the first day of *Easter* term (the 4th of *May*,) it was not issued till the day before. In the mean time, the defendant in the action became bankrupt on the 19th of *March*, and on the 21st of *April* surrendered in discharge of his bail. Whereupon in this term *Marryatt*, on behalf of the sheriff, obtained a rule *nisi* for setting aside the attachment, upon the ground of the delay in issuing it, whereby he was prevented, as it was sworn, from proving the debt under the commission, as he might have done if the attachment had issued before the bankruptcy.

Jervis and *Lawes* shewed cause against setting aside the attachment; and said that there was no rule of practice requiring a party to issue his writ of attachment against the sheriff immediately after it is obtained: and here the action being by original, the attachment could not be made returnable before the first return of this term; before which time it was issued. In *Rex v. The Sheriff of Surry*, 7 Term Rep. 452, there was a delay of several terms in issuing the attachment against the sheriff, which was afterwards set aside. In *Rex v. Perring*, 3 Bos. & Pull. 161, the rule for the attachment was obtained on the 19th of *November*, and the attachment was not sued out till the 9th of *March* following; and the Court of C. B. held that to be too late. But the practice of the two courts differ in these cases: for in C. B., though the rule to bring in the body has expired, yet if the defendant justify his bail before the attachment against the sheriff be moved for, it is in time to prevent it: *Thorold v. Fisher*, 1 H. Blac. 9: but in this court, if the sheriff be once in contempt for not bringing in the body, it is not purged by the defendant afterwards surrendering, though before the attachment be moved for, *Rex v. Sheriff of Middlesex*, 8 Term Rep. 29.

LORD ELLENBOROUGH, C. J. There is no occasion to lay down any general rule with respect to the lapse of time which shall be deemed sufficient to discharge the sheriff from the attachment in these cases; but certainly 80 days exclusive is a long time to lie by after the party is armed with the process of the court against the sheriff: and here in the mean time an important change of circumstances has taken place by the bankruptcy of the defendant. If there be no established practice of this court in such cases, there is at least a rule of right reason and justice which ought to be applied to the case before us; that if a party has a right to enforce payment of his debt against the sheriff, he must pursue it within a reasonable time, and not lie by so long as that by his laches the sheriff shall be deprived of his remedy over against the debtor. The mere time which elapsed in this case before the attachment was sued out does not very much fall short of what occurred in *The King v. Perring*: there it was 109, and here it is 80 days; and here the defendant's bankruptcy has intervened.

Per Curiam,

Rule absolute.

The King v. Richardson.

9 East, 463. May 27, 1808.

The stat. 32 G. 3. c. 58. s. 1, enabling defendants in *quo warranto* to plead double, is, as well as the stat. 9 Ann. c. 20., confined to corporate officers.

AN information in nature of a *quo warranto* having been filed against this defendant, to shew by what authority he claimed to be portreeve(a) of the

(a) Vide *Rex v. Mein*, 3 Term Rep. 596.

borough of *Penryn* in *Cornwall*, he obtained a rule for pleading double : whereupon,

Burrough moved, on a former day, to discharge that rule; stating that this was a borough by prescription, sending members to Parliament, of which the portreeve was the returning officer, and elected at a prescriptive court leet; but not being a corporate officer, he contended that the defendant was not within the stat. 9 Ann. c. 20, allowing double pleading by leave of the Court; which statute had been often held, particularly in *Rex v. Wallis*, 5 Term Rep. 376, where all the prior cases were considered, to be confined to corporate officers; and consequently, that he was not within the stat. 32 Geo. 3. c. 53. s. 1, which was made in *pari materia* with the former act, and merely limited the time for prosecuting such informations, and must therefore receive the same construction in this respect.

The Attorney-General and *Dampier*, contra, on shewing cause, endeavoured to distinguish this from the case of *The King v. Wallis*, because the office in question there was constable of *Birmingham*, which is no borough, nor sends members to Parliament as the borough of *Penryn* does, which properly constitutes it a borough; and also from a late case of *The King v. Bingham*, where the double plea was disallowed by *Lawrence, J.* in Court, in the case of the principal common law officer of *Gosport*, which is not a borough sending members to Parliament. The words of the statute of Anne extend as well to offices and franchises in boroughs as in corporations, and portreeves of boroughs are expressly named amongst other officers. It is sufficient, therefore, to bring the case within the act, that the defendant, the portreeve, claims an office or franchise within a borough. The same reason also holds between corporations and boroughs sending members to Parliament; and both were plainly within the view of the Legislature when they passed the act of the 32 Geo. 3. which has in substance the same words as the former law, and ought to be construed favourably in advancement of the freedom of election and the quiet and good order of boroughs, as well as of towns corporate, both of which are named. But if a prescriptive borough be held not to be within the meaning of the clause so far as respects the pleading double, neither will it be within it in respect of the limitation of six years for filing informations in nature of *quo warranto* against borough officers, which will very much abridge the benefit of the act.

LORD ELLENBOROUGH, C. J. The two acts being in *pari materia*, the one following the other almost *verbatim* in this respect, the construction of the one must govern the other: and then the case of the *King v. Wallis* is in point, that the construction is to be confined to corporate offices.

Per Curiam,

The rule for pleading double discharge.

Chambers v. Donaldson and Others.

9 East 471. May 27, 1808.

A feme covert living apart from her husband under sentence of separation with alimony allowed *pendente lite* in the ecclesiastical court, having brought trespass in the name of her husband against wrongdoers for breaking and entering her house and taking her goods, the Court refused, on the application of such defendants, to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs) that the action was brought without his authority.

THE plaintiff's wife was living apart from him, under a sentence of separation, with alimony allowed, *pendente lite*, in the ecclesiastical court: and during that time, the defendants broke and entered her house and took away her goods; for which an action of trespass was brought by her in her husband's name, as for breaking and entering his house and taking his goods:

on which the defendants obtained a rule nisi for staying the proceedings, and making the plaintiff's attorney pay the costs, upon an affidavit, amongst others, of the husband himself, the nominal plaintiff, stating that the action had been commenced in his name without his authority: against which rule.

Marryat now shewed cause, disclosing the real circumstances of the case as above stated; and observed that the plaintiff had not released the action, as he might have done, without lending his aid to the present application: but which he refrained from doing, because it would be in fraud of the decree of the ecclesiastical court, which would make him indemnify the wife for her loss by his act. Neither did he apply to this Court to be indemnified against any claim upon him for costs in case the action did not succeed; which the court would of course have directed to be done, and which the plaintiff's attorney was ready to have done: and therefore he concluded that the Court would not interfere in this summary way, against the justice of the case, thereby leaving the wife without any protection against wrongdoers.

Richardson, contra, urged that the action ought not to have been brought in the husband's name, which exposed him to the peril of costs, at least without previous application to him for that purpose, and tender of a sufficient indemnity.

LORD ELLENBOROUGH, C. J. It is very evident that this application cannot be made on the part of the husband, the plaintiff on the record; for if he do not choose that the action should proceed, he has a remedy in his own hand, without this application, by releasing it; and if the attorney who sued out the writ had behaved ill in so doing, the husband might have applied against him for such misconduct; or if the subject of the complaint were only that the husband was made liable to the risk of costs without his consent, we should have taken care, upon a proper application, to have secured his indemnity. But it is evident that this is an application by the defendants, colluding with the husband, to protect their own wrong, by defeating the action in the only form in which, under the unfortunate circumstances of the case, the wife can protect herself⁽¹⁾; and we will not lend our discretionary aid to the defendants to divert those legal forms, which are framed for the furtherance of justice, to the purpose of defeating it.

Per Curiam,

Rule discharged.

Amey v. Long.

[S. C. at *Nisi Prius*, 1 Campb. 14.]

9 East, 478. May 28, 1808.

The writ of *subpoena duces tecum* is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge. And in an action against a sheriff's bailiff, for disobeying such writ, who having been subpoenaed, in a former action by the plaintiff against another, to produce the warrant under which he acted, had neglected so to do, whereby the plaintiff was nonsuited, his ability to produce the warrant and his want of just excuse for not producing it, are sufficiently alleged by stating, that he could and might in obedience to the said writ of *subpoena* have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary.

THIS was an action on the case, in which the declaration stated that the plaintiff, in *Michaelmas* term 47 Geo. 3. in the Court of K. B. impleaded one K. Smith in a plea of trespass on the case to the plaintiff's damage of 500*l.*; and such proceedings were thereupon had, that afterwards, on the 2d of December 1806, at the sittings at *Nisi Prius* at Westminster

(1) Vide *Bogget v. Frier & al.* 11 East 301. and the editor's note to that case, p. 304.

&c. before Lord *Ellenborough*, C. J. a certain issue joined in the said plea between the plaintiff and K. S. in due manner was tried, &c.: and that before the trial of the said issue, viz. on the 29th of *November* 1806, the plaintiff prosecuted out of the said court his Majesty's writ of *subpœna*, directed to — *Railton W. F. Hope, C. Long* (the defendant), and *A. Grace*; by which writ the king commanded them that they should appear in their proper persons respectively before the said *Edward Lord E. &c.* in his Majesty's said court at *Westminster Hall*, in the county of *Middlesex*, on *Tuesday* then next, viz. on the 2d of *December* 1806, &c.: And that they the said *C. Long* and *A. Grace*, or one of them, should produce and shew forth at the time and place aforesaid, a certain warrant granted to them or one of them by the *Sheriff of Surry*, upon a certain writ of *non omittas testatum fieri facias* issued out and under the seal of the said Court, &c. on or about the 13th of *May* then last, between the plaintiff and *S. Glover*, defendant, and the paper writing or instructions which accompanied the same warrant; and then and there to testify and shew all and singular those things which they knew, or the said warrant, papers, &c. might import, of and concerning the said action between the plaintiff and *K. Smith*, &c. which said writ the plaintiff afterwards, and before the trial of the said issue, viz. on the 1st of *December* 1806, at *Westminster*, &c. caused to be made known and shewn to the defendant, and a copy thereof to be left with him, and then and there paid him 1s., being a reasonable sum for his costs and charges in attending as a witness, according to the tenor of the said writ of *subpœna*. And although the defendant, in part obedience of the said writ of *subpœna*, did afterwards, on the 2d *December* 1806, at *W. &c.* appear as a witness on the trial of the said issue; and although the defendant could and might, in obedience of the said *subpœna*, have produced and shewn forth at the time and place aforesaid on the said trial of the said issue the said warrant so mentioned and referred to in the said writ of *subpœna*, as aforesaid, and thereby so required to be produced and shewn forth as aforesaid; and although the production and shewing forth of the said warrant was material evidence for the plaintiff on the said trial, and would have enabled the plaintiff to have obtained a verdict on the said issue against the said *K. S.* at *W. &c.* whereof the defendant there had notice; yet the defendant not regarding his duty in that behalf, but wrongfully and unjustly intending to injure the plaintiff and to deprive her of the benefit of the same evidence on the trial of the said issue, and thereby to prevent her from obtaining a verdict against the said *K. S.* thereon, and to put her to expence, &c. did not nor would at the time and place aforesaid, on the said trial of the said issue, produce or shew forth the said warrant, or the said paper writing or instructions so mentioned and referred to in the said writ of *subpœna* as aforesaid; although the defendant was then and there solemnly called upon by the said Court for that purpose, and had no lawful or reasonable excuse or impeachment to the contrary; but then and there wholly neglected and refused so to do: and by reason thereof the plaintiff was nonsuited in the said action: and such proceedings were thereupon had in the said action, that afterwards in Hil. 47 Geo. 3. the said *K. S.* recovered against the plaintiff 52*l.* 10*s.* for his costs and charges about his defence in that behalf, as by the record, &c. more fully appears. By reason of which said several premises, the plaintiff was not only obliged to pay and did pay to the said *K. S.* the said sum of 52*l.* 10*s.* but was hindered and delayed in the recovery of her damages in the plea aforesaid, and was obliged to lay out 200*l.* more in and about the prosecution of the said action, &c. There was another count in substance the same. To which the defendant pleaded not guilty; and the plaintiff obtained a verdict.

A motion was made in last *Hilary* term, to arrest the judgment in this case, on two grounds; 1st, that it was not sufficiently alleged in the declaration, that the defendant had it in his power to produce the warrant which the writ

of *subpœna duces tecum* required him and another person to whom it was directed, or one of them, to produce at the trial. 2dly, That which is commonly called a writ of *subpœna duces tecum* is not of compulsory obligation in the law. The case was argued at length by *Park*, *Marryat*, and *Pell*, on shewing cause against the rule for arresting the judgment; and by *The Attorney-General*, and *Garrow*, in support of it.

Against the rule it was urged, on the first ground of objection, that after verdict it was to be presumed that every material allegation in the declaration, necessary to support the *gravamen* of the complaint, was proved: and consequently, it must be taken that the defendant *could and might have produced at the trial the warrant* mentioned in the *subpœna duces tecum*. For if it had appeared to the Court and jury, that he had it not in his possession or controul (not having voluntarily parted with it in fraud of the *subpœna*), and consequently could not in fact have produced it, but by the consent of others, over whose acts he had no control, the plaintiff could not have recovered a verdict upon that allegation. And this presumption arises more strongly from the subsequent allegation, that the defendant *had no lawful or reasonable excuse or impediment to the contrary*, which let them in to shew, if he had, any reasonable excuse for not having ready to produce at the trial the warrant which was once in his possession, and was his authority for what he did by the sheriff's command. Upon this head of presumptions after verdict, they referred principally to *Macmurdo v. Smith*, 7 Term Rep. 518., Bull. Ni. Pri. 320. and 1 Saund. 228. note 1. by Serjt. *Williams*, which collects all the cases. As to the second and principal point; they contended that the writ of *subpœna duces tecum* was known to have been in general use for a considerable period past. It is to be found in *Clerk's Manual*, 31, which was published in 1678, in the *Thesaurus Brevium*, 304, and *Officina Brev.* 385., amongst other forms of acknowledged writs. The precedents of the common *subpœna ad testificandum* are scarcely more ancient than those of the *subpœna duces tecum*. This writ is of essential importance to the due administration of justice; oftentimes as much so as the common writ of *subpœna* to compel the attendance of witnesses: for where a matter depends upon written evidence in the possession of another than the party in the cause who is interested in its production, it would be nugatory to enforce his personal attendance, without the document by which the truth of the fact in issue can alone be proved. And as the obligation of a witness to answer by parol does not depend upon his own judgment but on that of the Court, the same rule must prevail with respect to his production of documentary evidence. The witness is bound at all events to bring with him the paper which he has been subpœnaed to produce; and when it is in Court he may then state any legal or reasonable excuse for withholding it, of which the Court will judge. In this respect there can be no distinction in principle between parol and written evidence. Proof of either kind, if within the knowledge or possession of the witness, ought to be produced, if legal; and of its legality the Court and not the witness must judge. This writ is also to be found in all modern books of entries and practice; it is spoken of by Mr. Justice *Blackstone* (3 Com. 382.) as a writ well known in the law. And though the general power of compelling a witness to produce every document in his possession was denied by Lord *Kenyon* in *Miles v. Dawson (a)* and *Bateson v. Hartshink*, 4 Esp. N. P. Cas. 43; and he protected the witnesses there in with-

(a) 1 Esp. Ni. Pri. Cas. 405. The case was thus stated by one of the defendant's counsel who was engaged in it. It was an action of trespass for taking the plaintiff's ship; and he called a witness to prove the taking, who it was alleged had done it under a letter of attorney from the defendant; which letter the witness had in his hands when called; but objected to produce it, though served with a *subpœna duces tecum*; and Lord *Kenyon* held that he was not obliged to produce it: in consequence of which the plaintiff was obliged to prove the fact of taking by the defendant's authority in another way.

holding certain documents which went to affect the interests of third persons ; yet those were mere exceptions to the general rule, standing on the same footing as the practice of the courts of equity, in refusing to compel a party to disclose his title ; and as the practice of the courts of law in refusing to compel a witness to give evidence which tends to criminate himself, or to disclose matters communicated to him confidentially in the character of counsel or attorney. And in *Leeds v. Cook*, 4 Esp. N. P. Cas. 256., where a witness had been served by the defendant with a *subpana duces tecum* to produce a letter written to her by the plaintiff, which it appeared she had afterwards given up to him at his request ; Lord *Ellenborough* let in parol evidence of its contents. Then supposing this writ to be of binding force like a common *subpana*, they referred to *Wakefield's* case, Rep. temp. Hardw. 313, and to *Pearson v. Hes*, Dougl. 556, recognizing that a remedy by action lay at the common law for the default of the witness.

On the part of the defendant, it was objected, first, that the declaration did not state any fact to shew that he, the witness in the former action, had the power of producing the warrant at the trial : it is not alleged that he had possession of it at the time of the service on him of the *subpana duces tecum*, and also at the time of the trial ; or that having it in the first instance, he might have held it till called to produce it ; which would have shewn that he had, or might, but for his own default, have had it to produce then. It is not even stated that he was at any time possessed of, or entitled to the possession of it : but the general allegations of the declaration would be answered by proof that another person, who had the warrant, had told the defendant that he would let him have it to produce, and that such person was ready to have delivered it to him on request. On the general point, they argued that the obligation to obey such a *subpana*, if legal, must always have existed, and been in general use : and if so, it was singular that so few precedents, and those comparatively in modern times, could be shewn ; that each should be directed to several persons, and for the production of public documents, such as parish registers. From thence they inferred that the writ of *subpana duces tecum* only lay to public officers for the production of the public documents in their custody, in which all persons had or might have an interest ; and could not properly be extended to private persons, to compel them to produce papers belonging to them individually, or which might happen to be in their custody. The inconvenience to some individuals of compelling such disclosures will more than counterbalance any convenience to others. This is notorious, and admitted, with respect to title deeds and the like ; and it applies in different degrees to other private papers. The owner of such papers, of a letter, for example, may not be able precisely to shew what detriment may ensue to him from the disclosure of its contents, and yet they may be such, concerning himself, his family, or friends, which he might justly dislike to publish. And if the plaintiff in the action have a right to read part of it in evidence, the defendant must necessarily have an equal right to have the remainder read, in order to be assured that it does not qualify or vary the sense of what was deemed material by the other. Then how can the materiality of any part of a paper which is demanded to be produced in evidence be ascertained, except by the perusal of it, if not by the party calling for it, at least by the Judge presiding at the trial ; which may let in all the inconvenience to be apprehended, although ultimately it should turn out that there was a sufficient reason for withholding it, either as not applicable to the issue between the parties, or as the production of it would be injurious to the legal interests of the witness. But further, when this subject was before the Legislature in the time of Queen *Elizabeth*, and when a remedy was given by the stat. 5 Eliz. c. 9. s. 12, for the nonattendance of witnesses upon whom process was served to testify, it is incredible that a like recompence should not have been given in case of the non-production of writings, as well

as for the non-appearance of the witnesses themselves, if it had been then considered that they were bound to produce any documents which the parties in a suit might think proper to call for. It is admitted, however, that the remedy of the party grieved by the default of a witness, in not appearing when served with a common *subpoena*, does not rest on this statute, but that there are many precedents of declarations in such actions at common law; but that only points the argument more strongly against the extension of the remedy to the case in question, of a witness appearing but not producing a paper which he was demanded by a *subpoena* to produce, of which not one precedent either ancient or modern has been shewn. They also relied on the opinion of Lord *Kenyon* in the cases before cited against the right to compel a witness to produce papers.

In addition to these arguments, it was stated to have been the opinion of some eminent men at the bar, now deceased, and of others who had sat on the bench, that a witness was not bound to produce papers belonging to him by virtue of a *subpoena duces tecum*, served on him at the suit of third persons; and that instances had occurred of witnesses having been advised in open court by the counsel of the adverse party in the cause not to produce the papers called for; though the production of them was not objected to on any special ground. But Lord *Ellenborough* and Mr. Justice *Lawrence* declared that they had never known of any such instances in their own time. And the latter said, that this was one of the greatest questions he had ever heard agitated in *Westminster Hall*: one which most deeply affected the administration of justice, both civil and criminal. That he could not reconcile it to his mind to suppose, that the innocence of a person accused might depend on the production of a certain document in the possession of another, who had no interest in withholding it, and yet that there should be no process in the country which could compel him to produce it in evidence. Lord *Ellenborough* said, that since the existence of the courts of law there must have been some method of compelling the production of written evidence, and they were not aware of any other method than by the writ of *subpoena duces tecum*. That the question being of very general and public concern, and as Lord *Kenyon* appeared to have once intimated great doubt at least of the efficacy of such a writ; and as the question was upon the record, and the ultimate decision of it would give the rule in future; the Court would give the case the most profound consideration, and deliver their opinion at another time. The case accordingly stood over from *Hilary* term to this day, when

Lord *ELLENBOROUGH*, C. J. delivered the unanimous opinion of the Court.

The judgment in this case was moved to be arrested on two grounds; first, that it was not alleged in the declaration with sufficient certainty, that the defendant *had it in his power* to do the thing which the writ of *subpoena duces tecum* required him and one *Grace*, or one of them, to do; viz. to produce the sheriff's warrant upon a *testatem fieri facias* to them, or one of them, directed. Secondly, That the supposed writ of *subpoena duces tecum* mentioned in the declaration was not a writ known to the law, nor had any such compulsory force and obligation attached to it as the declaration supposes. As to the first of these objections, and which applies to both counts of the declaration equally, it appears to us that the allegation "that the defendant *could and might* in "obedience to the said *subpoena* have produced and shewn forth at the time "and place aforesaid at the said trial of the said issue the said warrant mentioned (and referred to in a writ of *subpoena*," in the plain, natural, and obvious sense of these words, imports an immediate physical ability to do the thing required to be done on the part of the defendant; i. e., that the defendant was able, by having the warrant in his own possession, to have produced it; and not that by application to others who had the custody of it he *could and might* have acquired the means, and indirectly have become the instru-

ment of producing it. The latter sense of the word is indeed so remote from the ordinary understanding of mankind on such a subject, and has so little reference to the duty sought to be enforced, viz. the production of that by the witness which the witness could, in obedience to the *subpoena*, personally produce; that, after verdict, it is not to be intended that the Judge at the trial received proof of the words in this strained and unnatural sense of them. And when it is afterwards said in the count, that the defendant did not, *nor would*, at the time and place of trial produce the warrant, although solemnly called upon by the Court for that purpose; "*and although he had no lawful or reasonable excuse or impediment to the contrary*;" it certainly excludes the case of the warrant being in the possession of another; and on that account attainable only through the means or by the delivery of such other person; inasmuch as the existence of such circumstances, if they had in fact existed, would have afforded "a lawful and reasonable excuse and impediment to the contrary;" and of course have falsified the allegation upon which the blame of non-production is rested: no man being obliged, according to any sense of the effect of such a *subpoena*, to sue and labour in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the *subpoena*. We are of opinion, therefore, that there is no ground for arresting the judgment upon this first objection.

As to the second, and most material objection, viz. that a *subpoena duces tecum* is not a writ of compulsory obligation and effect in the law; it has been principally maintained in argument, on the part of the defendant, on the ground that no such writ is to be found in the *Registrum Brevium*, nor any where else prior to the time of Car. 2. when the instances to be found in *Clerk's Manual*, 31. *Thesaurus Brevium*, 304. and *Officina Brevium* 385 first occur. But when it is recollected that the *Registrum Brevium* does not even contain the common writ of *subpoena ad testificandum*, the antiquity and compulsory effect of which is not disputed, [His Lordship here referred to *Pearson v. Iles*, Dougl. 556. 561. where it is laid down by Lord Mansfield, that the Courts of Westminster Hall proceeded against witnesses who wilfully absented themselves, as for as for a contempt, before the stat. 5 Eliz. c. 9.: and that statute refers to process out of courts of record to testify concerning matters depending in those courts, as process then known and in use;] the observation arising from the omission of the writ in question becomes less important. And indeed there are a multitude of writs, in daily use and unquestioned legal validity and effect, which are not inserted in that collection. One need not go further for an instance than the very writ of *non omittas fieri facias*, mentioned in this same declaration. The right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. And it is not possible to conceive that such courts should have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favour of those in whose custody the required instruments might happen to be, afforded. The courts of common law, therefore, in order to administer the justice they have been in the habit of doing for so many centuries, must have employed the same or similar means to those which we find them to have in fact used from the time of Charles the Second at least, according to the entries before referred to; unless indeed it is to be inferred from the circumstances of those particular entries being found to respect books and papers in the custody of rectors, vicars, and churchwardens, that the compulsory power of the Court related only to books and papers of that

description, and producible only by such persons, and upon the question of nonage merely : a supposition to which we can by no means accede. They may be taken therefore as known and recorded special instances of a general practice to compel by writ the production of necessary written testimony at the trial of suits at law. In the case of *The King v. Dixon*, 3 Burr. 1687. it was held by Lord Mansfield, and the rest of the Court, that an attorney who had been served with a *subpoena duces tecum* out of the Crown office, to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied upon before a Master in Chancery, and which *subpoena* had been served upon the attorney, in order to found a prosecution for forgery against his client was not bound to produce those required vouchers. In that case no objection was taken to the writ, but to the special circumstances under which the party possessed the papers ; so that the Court may be considered as recognizing the general obligation to obey writs of that description in other cases. Indeed, the *nisi prius* case of *Miles v. Dawson*, 1 Esp. N. P. Cas. 405. in which Lord Kenyon refused to compel a witness to produce a power of attorney in his possession, establishes in principle nothing more than this, that there are circumstances in respect of which the production of an instrument, required in the terms of a *subpoena*, would not be enforced by the authority of the Court ; which is a proposition too clear to be doubted. And, to be sure, though it will be always prudent and proper for a witness, served with such a *subpoena*, to be prepared to produce specified papers and instruments at the trial, if it be at all likely that the Judge will deem such production fit to be there insisted upon ; yet it is in every instance a question for the consideration of the Judge at *nisi prius*, whether, upon the principles of reason and equity, such production should be required by him, and of the Court afterwards, whether, having been there withheld, the party should be punished by attachment. I have not thought it necessary to advert to certain extrajudicial opinions, supposed to have been entertained and expressed by several eminent lawyers on this subject, as they afford no safe basis for judicial determination, and are contradicted by the actual practice and experience of courts of law during the period already alluded to, as well as opposed by the convenience and necessity of common law trials, which must have at all times required, and may therefore be presumed to have had, the use of some such means as the writ in question, to conduct them to any useful and effectual termination. Upon the whole, therefore, as to the general question, whether a writ of *subpoena duces tecum* be a writ of compulsory obligation and effect in the law ; we are of opinion that it is : and, therefore, that neither upon this second ground, any more than the former, ought this judgment to be arrested. (1)(2)

Rule discharged.

(1) Vide *Richards v. Stewart*, 2 Day 328. Editor's note to *Miles & al. v. Dawson*, 1 Esp. 405. (Day's edit.)

(2) [See *Field v. Beaumont*, 1 Swans. 209. *Delany v. The Regulators*, 1 Yeates, 403. *Shippen v. Wells*, 2 do. 260. *Gray v. Penland*, 2 S. & R. 23. *Utica Bank v. Killard*, 5 Cow. 153. 419. *U. S. v. Reyburn*, 6 Pet. 367. *Bull v. Loveland*, 10 Pick. 9. *Hawkins v. Sumpter*, 4 Dem. 446. *Durkee v. Leland*, 4 Verm. R. 612. *Threlfall v. Webster*, 1 Bing. 161.—W.]

Robertson and Another, Assignees of Milburn, Hallowell, and Walmsley, Bankrupts, v. Sir Thomas Henry Liddell, Bart.

9 East, 487. May 28, 1808.

The departure of a trader from his dwelling-house, *with intent* to delay his creditors, is an act of bankruptcy, though no creditor be *thereby* in fact delayed. And the words in the stat. 1 Jac. I. c. 15. s. 2, following this and other acts of bankruptcy committed, viz. "to the intent or *whereby* his creditors *shall* or *may* be defeated or delayed," &c. are to be read "to the intent his creditors *shall*, or *whereby*, (or *that thereby*) they *may* be defeated," &c. But the lying in prison six months upon an arrest is made a substantive act of bankruptcy independent of any intent of the trader.

So in the case of an act of bankruptcy by the trader's *beginning to keep house*, the denial of a creditor is usually given in evidence, not to shew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he *began to keep house with intent* to delay his creditors.

IN *trover*, the following case was made for the opinion of this Court, which was tried before *Chambre, J.* at the assizes for *Northumberland* in 1805.

The action was brought against the late sheriff of *Northumberland* to recover the value of household furniture belonging to the bankrupt *Milburn*, sold by the sheriff under an execution at the suit of *Newnham and Co.* upon a judgment obtained after the supposed act of bankruptcy and the actual assignment to the plaintiffs. *Milburn, Hallowell, and Walmsley*, were copartners in the business of ship-building at *North Shields* in the county of *Northumberland*; and *Milburn, Hallowell*, and one *Humble* were also partners in a brewery at the same place. In *August* 1803, their partnership concerns became much deranged, and on the 6th of *December* following, *Milburn, Hallowell, and Walmsley*, (the two former having been arrested about three weeks before) left *North Shields* from an apprehension of being arrested by *Brown and Dixon of Newcastle*, and other creditors. They left home together, and crossed over the river *Tyne* to *South Shields*, in the county of *Durham*, in order to get out of *Northumberland*, and came up to *Gateshead*, in the county of *Durham*. Whilst they were at *Gateshead* they sent for *Mr. Bainbridge*, an attorney of *Newcastle*, who went to *Gateshead*, and found all the three parties there together. They then informed him, that they had left their homes for fear of being arrested, and they said that they crossed the water at *South Shields* in order to get out of the county of *Northumberland* as soon as they could, and had come up on the south side in the county of *Durham*, and that they were on their road to *Gillsland* in *Cumberland*. *Bainbridge* told them, that he was afraid their proceedings would end in a commission of bankrupt, and wished them to go back to *North Shields*. *Walmsley* did in fact return thither either on that or the following day; and *Bainbridge* told him to be extremely circumspect in what way he acted: but *Milburn and Hallowell* proceeded to *Gillsland*. Several creditors of *Milburn, Hallowell, and Walmsley*, called for the payment of their debts^(a) during the absence of *Milburn and Hallowell*; but it did not appear whether they so called during the absence of *Walmsley*, in manner and for the purpose aforesaid, or after *Walmsley's* return to *North Shields* from *Gateshead*. A joint commission of bankrupt was issued against *Milburn, Hallowell, and Walmsley*; upon which they were declared bankrupts, and the plaintiffs were duly chosen assignees. The question was, Whether an act of bankruptcy had or had not been committed by *Milburn, Hallowell, and Walmsley*.

(a) It was admitted that they were not paid.

The only question argued was, Whether *Walmsley's* having departed from his dwelling-house *with intent* to delay his creditors, but *no creditor* having been *in fact delayed* by such his departure and before his return home, constituted an act of bankruptcy? The affirmative of the question was argued by *Carr* for the plaintiffs; and the negative by *Hullock* for the defendant. The argument turned upon the critical meaning of the words of the stat. 1 Jac. 1. c. 15. s. 2, as preceded and explained by the stat. 13 Eliz. c. 7. s. 1, made in *pari materia*, and upon the construction which these statutes had received in different cases. The gist and force of the argument was afterwards fully stated by Lord *Ellenborough* in delivering the judgment of the Court on a subsequent day in the term, and therefore it will be sufficient to state the several provisions of the two statutes, and the cases which were referred to and commented upon.

By stat. 13 Eliz. c. 7. s. 1, "if any merchant, &c. shall depart the realm, "or begin to keep his house, or otherwise to absent himself, or take sanctuary; "or suffer himself willingly to be arrested for any debt, &c.; or suffer himself be outlawed; or yield himself to prison; or depart from his dwelling house or houses, to the intent or purpose to defraud or hinder any "of his creditors of their just debt," &c.; he shall be deemed a bankrupt. Then the stat. 1 Jac. 1. c. 15, intituled "An act for the better relief of the creditors," &c. reciting amongst other defects, that "the description of a bankrupt in former statutes is not so fully expressed" as is meet, enacts by s. 2, "that every person using the trade of merchandize, &c. who shall depart "the realm; or begin to keep his house, or otherwise to absent himself, "or take sanctuary; or suffer himself willingly to be arrested for any debt, " &c.; or suffer himself to be outlawed; or yield himself to prison(a); "or willingly or fraudulently procure himself to be arrested, or his goods, "money, or chattels, to be attached or sequestered; or depart from his "dwelling-house; or make or cause to be made any fraudulent grant "or conveyance of his lands, goods, &c. to the intent or whereby his creditors "shall or may be defeated or delayed for the recovery of their just and true "debts; or being arrested for debt shall after his arrest lie in prison six "months or more upon that arrest, or upon any other arrest, &c. shall be "adjudged a bankrupt." The authorities cited and commented upon by *Carr*, were 1 Com. Dig. 523. Bankrupt, C. 1. 1 Bac. Abr. 383. Bankrupt, A. *Colkitt v. Freeman*, 2 Term Rep. 59(b). *Heylor v. Hall*, Palm. 325. *Dickinson v. Foord*, Barnes, 160. *Phillips and Peake v. The Sheriff of Essex*, before *Eyre* C. J. Green, 52. and 2 Montague, 168. *Aldridge v. Ireland*, E. 34 Geo. 3. cited 7 Term Rep. 512. and *Fowler v. Pagett*, ib. 509. and *Hawkins v. Lukin*, T. 36 G. 3. ib. 516. *Barnard v. Vaughan*, 8 Term Rep. 149, explained in *Wilson v. Norman*, Cullen, 34. and 1 Esp. N. P. Cas. 334. *Assignees of Miller v. Turner*, Montague 167. *Adey and Others Assignees of Parker*, v.—Sittings at Westminster M. 41 Geo. 3. ib. There Lord *Kenyon*, C. J. said (MS.) that the real ground of decision in *Barnard v. Vaughan* was, that Mrs. *Barnard* left her dwelling house to avoid the inconvenience of being there with the sheriff's execution, and not to avoid her creditors. *Hornsby and Others, Assignees of Needham, v. Neville, York Lent Assizes* 1801, when *Chambre, J.* held, that the trader leaving his house with intent to delay his creditors, though none were actually delayed, was an act of bankruptcy. The same opinion by Lord *Eldon* in *Wolf v. Horn*, in Chancery, T. 44 G. 3. and *Hammond and Others, Assignees of Gadsden, v. Hincks*, T. 44 G. 3. 5 Esp. N. P. Cas. 139 S. P. *Garret v. Moule*, 5 Term Rep. 575. *King v. Bebb*, Exchq. Hil. 46 G. 3. and *Dudley v. Vaughan*, Sittings at

(a) So far following the former statute.

(b) This was only cited to shew, that if *Walmsley* committed an act of bankruptcy by departing from his dwelling house with intent to delay his creditors, his return home again could not purge the act of bankruptcy; which was admitted at once by the Court.

Guildhall after last *Easter* term, (1) before Lord *Ellenborough*, C. J. who ruled that a trader beginning to keep house with intent to delay his creditors was sufficient to constitute an act of bankruptcy, though he were only denied to be seen, but not denied to be at home. In addition to these *Hullock* mentioned another *nisi prius* case before *Chambre*, J. where the result was different from that in *Hornsbey v. Neville*; also *Juckman v. Nightingale*, E. 13 G. 2. per *Lee*, C. J. at *Guildhall*, Bull. N. P. 40.; *Hawkes v. Saunders*, T. 24, G. 3. *Cooke's Bank. Laws*, 4th edit. 74. *Judine v. Da Cossen*, 1 New Rep. 234.; and *Ex parte Cockshot*, 3 Bro. Ch. Cas. 504.

LORD ELLENBOROUGH, C. J. now delivered judgment.—After stating the case—The validity of this joint commission of bankrupt against the three partners depends upon the question, Whether *Walmsley*, one of them, duly became a bankrupt under the circumstances stated: for, respecting the bankruptcy of the other two, *Milburn* and *Hallowell*, no question has been ever raised. Whether *Walmsley* became a bankrupt depends upon this point, Whether a departure from his dwelling house, by a trader, *with intent* to delay his creditors, be a sufficient act of bankruptcy, within the meaning of the stat. 1 Jac. 1. c. 15. s. 2., although no creditor should have been *thereby* in fact *defeated or delayed* for the recovery of his debt. This fact of departing from the dwelling-house by a trader is one of several indications of insolvency, constituted and declared to be acts of bankruptcy by stat. 13 Eliz. c. 7. when accompanied with the *intent or purpose* to defraud or hinder any of his creditors, &c. It will be observed, that upon the language of this statute the act is complete by being done with the *intent* specified; the words, “*or purpose*,” being merely additional words to the same effect, and which carry the sense no further than it was carried before by the preceding word *intent*. The stat. 1 Jac. 1. c. 15, introduces three new specific acts of bankruptcy, in addition to those specified in the stat. 13 Eliz.: two of which, together with all the other acts of bankruptcy enumerated in the stat. 13 Eliz., precede and are governed by their relation to these words which follow them; viz. “*to the intent, or whereby* his or their creditors “shall or may be defeated or delayed,” &c. The third new act of bankruptcy in the stat. 1 Jac. 1. viz. the lying in prison six months upon an arrest, is made a substantive act of bankruptcy, independent of any *intent* of the party, not being in the context connected therewith. These words, “*to the intent or whereby*,” literally taken in their disjunctive sense, may be thought to import that a *beginning to keep house*, and a *departing from the dwelling-house* (and any other of the acts specified) are acts of bankruptcy, whether they be done with an intent to delay, or be merely productive of that effect, however innocently and unintentionally they may have happened to produce it. Upon this construction of the words “*or whereby*,” a temporary retirement and privacy, by staying in a man's own house, to the exclusion of strangers, during the hours of sleep, or refreshment, or during a period of sickness, or domestic affliction, might be an act of bankruptcy, as “*a beginning to keep house*,” in the same manner as going abroad for the purpose of exercise, business, or entertainment, might also be, as a departing from the dwelling-house; if during any of those periods a creditor called in vain for his debt. It hardly needs any argument to prove that such could not have been the intention of the Legislature: and if it could not, the words “*or whereby*,” must either be rejected, or understood in some other sense. A cure for this difficulty was sought in the case of *Fowler v. Pagett*, 7 Term Rep. 509, where a creditor had left his dwelling-house for a short time in order to seek and secure the means of satisfying his creditors, and with no purpose of delaying them, but who had in fact by his absence occasioned a delay to some of them, who had called for payment whilst he was from home. Lord *Kenyon* in that case thought that “by read-

(1) Reported in 1 Campb. 271.

ing the word "*and*" for "*or*" in the stat. 1 Jac. 1. c. 15, as was frequently "done in the construction of legal instruments where the sense requires it, "all difficulty would be got over." And indeed the difficulty of the particular case was thereby disposed of; for as no intention of delay existed on the part of the trader who departed from his dwelling-house, both the circumstances, which a copulative construction of the words required, (if that were the necessary construction) could not take effect in that case; and if the intent of the departure be alone considered as material, still that case will at any rate have been well decided: although the mode of solving the difficulty which was resorted to on that occasion may not be satisfactory. The objection to this construction, which requires that both the intent and the consequence of delay should concur, in order to constitute the act of bankruptcy, is that the bankruptcy is made to depend not merely on the acts and intents of the bankrupt himself, however clear and unequivocal they may be; but upon the fortuitous coincidence of the acts of other persons; and which acts (in the instance particularly of a departure from the dwelling-house) are less likely to concur in the proportion in which that departure is most notorious. For when the flight of an insolvent trader from his house of trade is universally known, it is not likely that any creditors, by uselessly calling for payment of their debts at such a time, should furnish the ordinary proof of delay, which arises from the non-payment of creditors so calling. If the consequence of actual delay be necessary to perfect every one of the several acts of bankruptcy in the stat. 1 Jac. 1. c. 15, which precede the words "*to the intent or whereby,*" &c., it must be necessary to perfect the act of *making a fraudulent conveyance*, which is one of them; but inasmuch as a fraudulent conveyance, shewn to be such, cannot in law have the effect of defeating or delaying a creditor; unless the *making* such a conveyance be an act of bankruptcy, consummated by the intent with which it is made, it can never become more an act of bankruptcy by any thing which may happen in respect to it afterwards. And indeed it has never been held necessary, in proof of this act of bankruptcy, to do more than to prove the execution of the deed under such circumstances as rendered it a fraudulent one in respect of creditors; without going on to shew that any creditor had been in fact ever delayed or defeated thereby. Indeed, the fact of delay in the case of beginning to keep house is usually resorted to *in evidence* for the mere purpose of explaining an act which might otherwise be equivocal; and the denial to a creditor is there given in evidence to shew that the party has *begun* to keep house; and it is from mistaking the intended effect of this evidence, as given to prove actual delay, that proof of actual delay can be required where the act of bankruptcy is by departing from his dwelling-house. If these and other inconveniences which might be shewn, arise from construing the word *or* for *and*, in this part of the statute, it is material to consider, whether some other cure in point of construction cannot be applied to these words, and whether the words which follow the word *intent*, i. e. "*or whereby*" may not, by a small change in them, be rendered susceptible of another sense, more consistent with the meaning of the original sentence as it occurs in the stat. 13 of Eliz. and more agreeable to the general scope and object of the bankrupt laws. If, instead of "*or whereby*" the sentence should be read, "*or that thereby*" or "*that*" (omitting the word *whereby*) the original sense of the word *purpose* in the stat. 13 Eliz. is restored; and inasmuch as it would neither extend or narrow the meaning of the immediately foregoing word *intent*, it would leave to that word its full operation and effect, without engrafting upon it any of the inconveniences already observed upon as resulting from the copulative construction suggested in the case of *Fowler v. Pagett*. Another mode of considering the words "*to the intent*" "*or whereby,*" as meaning the same thing, is this; by referring the former to the word *shall*, and the latter to the word *may*, i. e. *to the intent* that the creditors *shall* be defeated, or *whereby* they *may*

be so. This gives the words the same effect as *intent or purpose* in the statute of Eliz., and prevents *this* act from operating in restriction of *that*, which it otherwise would do, and which, as may be collected from the title, which is for the better relief of creditors, could not have been intended. It would be a superfluous waste of time to advert to all the various cases which have been cited in argument. The latest of them is that of *Hammond and others, assignees of Gadsden, a Bankrupt, v Hincks*, which having been tried at *Nisi Prius* before the present Chief justice of the Common Pleas, came before that Court upon a motion for a new trial, as reported in 5 Esp. 141. In that case the Chief Justice is reported to have laid down at *Nisi Prius*, and the Court of Common Pleas, in refusing to make the rule absolute, must be taken to have agreed with him, that evidence of the actual delay of a creditor, by the bankrupt's leaving his house to avoid his creditors, was not necessary to constitute an act of bankruptcy. As far as we are able to collect what was the opinion of the Court of Exchequer upon that subject from the statement made to us of what passed in that court, upon the motion for a new trial, in *King v. Bebb*, upon *Castell and Powell's* bankruptcy, we cannot but suppose that it inclined the same way with that of the Common Pleas in the case of *Hammond v. Hincks*. Upon the authority, therefore, of these later cases, in which all the former ones were, as we understand, considered; as indeed they have been by us upon the present argument: upon the sound construction of the statute 1 Jac. 1. c. 15., explained by the antecedent statute of 13 Eliz., made in *pari materia*, and almost in *iisdem terminis* with the other, excepting only what appears to have been a casual and unintended variation in the phrase of a particular sentence; as well as upon the reason and convenience of the thing; we are of opinion that *Walmsley*, in leaving home with intent to delay his creditors, committed an act of bankruptcy, although no creditors were thereby in fact delayed; and that therefore the *postea* should be delivered to the plaintiffs(1).

Judgment for the Plaintiffs.

Blanchard v. Lilley and Others.

The King v. Blanchard.

9 East, 497. May 28, 1808.

An award that certain actions be *discontinued*, and each party pay his own costs, is final and good, being in effect an award of a *desi processus*.

THE above cause and prosecution for a misdemeanor arising out of the same transaction, as well as other causes, were referred to an arbitrator, under a rule of reference of *all* matters in difference between the parties; and the arbitrator awarded "in favour of the defendants in the first mentioned cause;" and as to the indictment, "that the verdict of acquittal should stand:" and further, "that each of the parties in the said causes should pay his or their own costs, and also their costs of the reference." Then reciting that two other causes were depending, one of *Edwards v. Blanchard*, and another of *Blanchard v. Edwards*; he awarded each to pay his own costs, and also his own costs of the reference, "and that the said actions be discontinued."

Espinasse, on a former day, had obtained a rule *nisi* for setting aside the award, on the ground that an award *to discontinue an action* was bad, because it did not make a final end of the matter in difference; for it did not prohibit any new action to be brought; and he cited *Tipping v. Smith*, 2 Stra. 1024, where an award, that all proceedings, if any, depending at law, should be no

(1) Vide *Williams v. Munn & Al.* 1 Taun. 270.

further prosecuted, was held ill, as not being final. And also 1 Com. Dig. 412. Arbitrament, E. 15. "An award that each shall be nonsuited, or discontinue his action against the other, is not good; for they may sue *de novo*," referring to 1 Rol. Abr. 252. l. 50.

Lawes and Gurney opposed the rule, on the ground that the award was sufficiently certain; evidently meaning that all litigation should cease between the parties upon the subjects in difference between them; and they referred to *Linsey and Ashton's* case, Godb. 255, where the award was, amongst other things, that the defendant should surcease all suits depending between the plaintiff and him, which he had done: and this was held good; and the plaintiff recovered on the arbitration bond for breach of another part of the award.

The Court thought the award intelligible enough; and that the arbitrator's meaning necessarily to be implied from it was, that there should be a *stet processus* in the actions pending; but because of the cases cited, which might have misled those who applied for the rule, they discharged the rule without costs.

Hoskins and Another Assignees of Deighton a Bankrupt, v. Duperoy.

9 East, 498. May 30, 1808.

Goods sold and delivered upon an agreement to be paid for by a present bill payable at a future day does not create a present debt, on which to found a commission of bankrupt: nor can an action for goods sold and delivered be maintained by the vendor before the time when the bill agreed to be given would have become due, and when the contract would be no longer executory. Neither can such executory contract, if no such bill payable at a future day be actually given to secure it, found a good petitioning creditor's debt within the statutes 7 Geo. 1. c. 31. s. 1. and 5 Geo. 2. c. 30. s. 22. which are confined to debts due on bills, bonds, promissory notes, and other personal written securities of the like sort payable at a future day; which alone by the latter statute are made available to found a good petitioning creditor's debt.

THIS was an action for money had and received by the defendant to and or the use of the bankrupt, before his bankruptcy, and for money had and received to the use of the assignees after the bankruptcy, and upon an account stated by the defendant with the assignees: to which the defendant pleaded the general issue; and on the trial at *Guildhall*, a special verdict was found, which stated, that *Deighton* before his bankruptcy carried on the trade of a calico printer and manufacturer, and on the 19th of *March* 1805, *Hamer* sold to him goods of various prices, by the yard, to the value in the whole of greatly more than 100*l.*, though the exact amount of them in money was never ascertained, nor any statement thereof rendered to *Deighton*: and it was expressly stipulated and agreed between them, at the time of the contract, that the amount of the price should be paid by *Deighton* to *Hamer* in a present bill of exchange, payable in two months from the time of the sale and delivery of the goods; and no other contract concerning the manner of payment for the goods was agreed upon between them. *Hamer* has never yet been paid for the goods: and after the sale and delivery thereof as before stated, but before the expiration of two months from such sale or delivery, viz. on the 26th of *March* 1805, *Deighton* committed an act of bankruptcy, by departing from his dwelling-house with intent to delay his creditors, and whereby certain of his creditors were delayed(a): and thereupon *Hamer*, on the 22d of

(a) The actual delay of a creditor is not necessary to constitute the act of bankruptcy, if the trader departed from his dwelling-house with that intent. Vide ante, 487. *Robertson v. Liddell*.

April 1805, petitioned the Chancellor for a commission of bankrupt to issue against *Deighton*, in which petition he stated, that *Deighton* was indebted to him in 100*l.* and upwards for goods sold and delivered; meaning the goods sold and delivered as aforesaid on the 19th of *March*; upon which a commission of bankrupt issued against *Deighton*, dated the 1st of *May* 1805, and he was declared to be a bankrupt, and the plaintiffs were chosen his assignees; and an assignment made to them of his effects, and they afterwards brought this action. And the question was, Whether the commission founded upon such petitioning creditor's debt were good? If it were, the jury assessed the plaintiffs' damages at 2295*l.*

This case was argued by *Yates* for the plaintiffs, and *Marryat* for the defendant; but as all the points made in argument, and the authorities cited bearing upon them, were brought in review in the judgment of the Court, it is not necessary to state them here: After time taken to advise on the case,

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court. After stating the pleadings, and the facts found by the special verdict—

On this special verdict the single question is, Whether at the time of the act of bankruptcy, viz. on the 26th of *March* 1805, *Hamer*, the petitioning creditor, were in point of law a good petitioning creditor; he having only seven days before, viz. on the 19th of *March* 1805, sold and delivered goods to the bankrupt to the value of more than 100*l.*, though the exact amount had not been ascertained, under an express contract that such goods should be paid for by a present bill at two months from the time of such sale and delivery. Observe, that no such bill had been given or demanded; and that the two months were not expired, either at the time of the act of bankruptcy, or of the issuing of the commission. The case on the part of the plaintiffs, the assignees, has been argued on two grounds: first, That by the sale and delivery of the goods a present debt was created from the buyer *Deighton* to the seller *Hamer*. Secondly, If that be not so, that it is within the statute 7 Geo. 1. c. 31, a debt proveable under the commission, and barred by the certificate; and by stat. 5 Geo. 2. c. 30, a good petitioning creditor's debt. As to the first ground; the verdict states the terms of the contract under which the goods were sold, viz. "that they should be paid for by a present bill, payable in two months from the time of such sale and delivery:" and in fact default had not been made in giving such bill; for the amount for which the bill was to be given does not appear to have been ever ascertained; nor was the bill ever called for, or demanded. But independent of this last observation, it is now settled by the two cases alluded to in the argument, of *Mussen v. Price*, 4 East, 147, in this Court, and *Dutton v. Solomonson*, 3 Bos. & Pull. 582, in the Court of Common Pleas, that where goods are sold upon a certain credit, to be paid for by a bill payable at a future day, the vendor cannot maintain an action for the goods sold until the time is arrived at which the bill would become due; because by the contract the goods are not to be paid for till that time. And the same doctrine is fully recognized by the more recent case in the Common Pleas, of *Brooke and Others v. White*, 1 New Rep. 330, where the Court held, that after the expiration of the time which the bill would have had to run, which by the terms of the contract was to have been given in payment for the goods, the seller might bring his action for goods sold and delivered; the contract being then no longer executory: the present Chief Justice, and the other Judges of the Court of Common Pleas, expressly admitting the distinction established by the former cases, that before the expiration of the time on the bill, such action for the goods sold and delivered could not be maintained. On this first ground we are therefore of opinion, that at the time of the act of bankruptcy, and of the commission sued out, there was not a present debt owing from the bankrupt to *Hamer* created by the sale and delivery of the goods(1).

(1) In addition to the cases cited by his Lordship, see *Colthay & al. v. Murray*, 1 Campb. 335.

And this brings the case to the second ground, on which it has been argued on behalf of the plaintiffs, the assignees; viz. Whether this be not a good petitioning creditor's debt within the stats. 7 Geo. 1. c. 31, and 5 Geo. 2. c. 30. This question depends on the construction of the 1st section of the stat. 7 Geo. 1, and the 22d section of the stat. 5 Geo. 2. The preamble of the first of those statutes recites the mischief or doubt which existed: "Whereas merchants and traders have been obliged to sell and dispose of their goods and merchandizes to such persons as have occasion for the same upon trust or credit, and to take bills, bonds, and promissory notes, or other personal securities, for their monies, payable at the end of three, four, or six months, or other future days of payment; and the buyers of such goods becoming bankrupts before the money upon such bonds, notes, or other securities became payable, it hath been a question whether such persons giving credit on such securities should be let in to prove their debts:" for remedy enacts, "That all persons who have given credit, or at any time hereafter shall give credit, on such securities as aforesaid, upon a good and valuable consideration, bona fide, for any sum of money, or any matter or thing whatsoever, which is or shall be due or payable at or before the time of such person becoming bankrupt, shall be admitted to prove his or her several and respective bills, bonds, notes, or other securities, promise, or agreements for the same, in the like manner as if they were payable presently, and not at a future day." Sect. 3. Provides, that no such creditor shall be deemed or taken to be a sufficient creditor, for or in respect of such debt, to petition, or join in any petition for the obtaining or suing forth any commission of bankrupt, until such time as such debt shall become actually due and payable. The 22d section of the stat. 5 Geo. 2., which repeals the above mentioned proviso of the stat. 7 Geo. 1. and enables creditors on securities due at a future day to be petitioning creditors for a commission of bankrupt, recites the former act of 7 Geo. 1. in these words: "Whereas by an act made in the 7th year of his late majesty, persons taking bills, bonds, promissory notes, or other personal security for their money, payable at a future day, (not saying promise or agreement for the same,) are enabled to prove their debts under a commission of bankrupt; but not to petition for or join in petitioning for any new commission: which having been found inconvenient; now it is hereby enacted, that so much of the said act as disables any such person from petitioning for a commission is hereby repealed; and it shall be lawful hereafter for such person to petition for any such commission, any thing in the said act contained to the contrary notwithstanding." It is observable, that this clause, on which the right of such creditor to petition for a commission alone rests, mentions only persons taking bills, bonds, notes, or other personal security, payable at a future day; and although it refers to the former act, and may be said to enable such creditors to petition for a commission, as by the former act were enabled only to prove their debts under a commission; still it shews the sense which the Legislature put on the former act, and is a legislative construction of that act; namely, that such creditors only were intended as had bills, bonds, notes, or securities of the like sort, payable at a future day. And such appears to have been the construction adopted by the different Courts in *Westminster Hall*. Lord Ch. Jus. *Lee at Nisi Prius*, in *Swaine v. De Mattos*, 2 Stra. 1211, and the Court of King's Bench, in *Pattison v. Bankes*, Cowp. 540, considered the stat. 7 Geo. 1. as explained by stat. 5 Geo. 2., and as relating to written securities: though the question in those cases was not respecting the right of a creditor for goods sold, payable by bill at a future day and where no bill or security had been given; but whether the securities were confined to securities for goods sold in the course of trade: and they held a creditor by bond or bill, payable at a future day, to be within the act; although such bond or bill were not for goods sold in the course of trade. Such was the opinion of Lord Chancellor King in the case *Ex parte The East India*

Company, 2 P. Wms. 345; and the Court of Common Pleas, in the time of Lord Chief Justice *Wilmot*, in *Chilton v. Whiffin*, 3 Wils. 13, and in *Godard v. Vanderheyden*, 3 Wils. 262, understood the statute in the same sense, as extending only to *written securities*; although that was not in either of the cases the point immediately in judgment. A case was also mentioned at the bar, as having been ruled at *Nisi Prius* at *Guildhall*, before Mr. Justice *Rooke*, (*Cox and Another, Assignees of Key, a Bankrupt, v. Cripps*), where he nonsuited the assignees, on the ground that the debt of the petitioning creditor, or at least a part of it necessary to make up 100*l.*, arose from goods sold and delivered upon a credit which was not expired at the time of the commission; and no motion was afterwards made in the Court of Common Pleas to set aside that nonsuit. And some of the judges of this court so expressed their understanding of the statutes in the late case of *Pearslow v. Dearlove*, 4 East, 438. We are aware, that in the case of *Henbest and Others v. Brown*, Peake's N. P. Cas. 54, Lord *Kenyon*, at *Guildhall*, said, that the inclination of his mind was that all debts whatever, though not due, were sufficient to support a commission; and that the act was not confined merely to bonds, notes, and bills. But the evidence there did not raise the point, and the matter was no further discussed. And a short time before, in *Cochran v. Love*, (shortly noticed in *Cooke's Bank. Laws.*), Lord *Kenyon* is reported to have intimated the like opinion at *Guildhall*. The respect due to any intimation of opinion of that very learned Judge has, as it ought, made us pause, and examine the statutes with attention, and the cases in which they have been brought under consideration of the Courts. And on the words of the acts themselves, we think the intention of the Legislature seems plain, to confine the power of petitioning for a commission of bankrupt to such creditors, where the debts are due at a day to come, as have *written securities* payable at a future day: and such construction seems to be confirmed by the greater weight of authorities which I have noticed. We are therefore of opinion, that on the facts found by this special verdict there does not appear a sufficient petitioning creditor's debt to support the commission of bankrupt which has been sued out against *Deighton*; and the plaintiffs, who found their title to recover in this action as assignees under such commission, have not such title. The consequence is, that judgment must be entered for the defendants.

Cuming v. Brown.

[S. C. at *Nisi Prius*, 1 Campb. 104.]

9 East 506. May 30, 1808.

The property of goods passes by the indorsement and delivery of the bill of lading by the consignee to another *bona fide* for a valuable consideration and without collusion with the consignee, although the indorsee knew at the time that the consignor had not received money-payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived: and after such assignment of the bill of lading the consignor cannot stop the goods *in transitu* upon the insolvency of the original consignee.

THIS was an action of trover against the Captain of a ship, who had signed bills of lading for some pipes of wine, which had been originally consigned by *Jean of Jersey*, (the real defendant in the cause) to *Maine of London*, and by him conveyed, by indorsement of the bill of lading, to the plaintiff for a valuable consideration. The invoice of the wines, which stated that they had been *bought for account of E. Maine of London*, was transmitted to *Maine* by *Jean* in a letter of the 31st of *December* 1806; and in another letter of the 17th of *February*, 1807, *Jean* transmitted the bill of lading for the same: at the foot of the invoice was written "payable in bill on *London* at

three months from the 20th *December* (1806), and marked with *Maine's* initials." The bill of lading, signed by the defendant, bore date "*Jersey* 14th Feb. 1807," and expressed that the wine was to be "shipped by *P. Jean* on board the *Britannia*," and "to be delivered to *E. Mayne or his assigns*, he or they paying freight: with liberty to stop at *Guernsey*." *Jean* drew a bill upon *Maine* for the value of these goods, dated 20th *December* 1806, at three months; which bill, due 23d of *March* 1807, was accepted by *Maine*; and on the 23d of *February* 1807, *Maine* indorsed the bill of lading in question to the plaintiff for a full and valuable consideration; and absconded about *April*; and has not since been heard of; leaving his acceptance unpaid. The goods which were first taken to *Guernsey* arrived at *London* about the beginning of *June*, and were demanded by the plaintiff of the defendant, who refused to deliver them, having been indemnified by the agent of *Jean* the consignor, who on notice of the absconding and insolvency of *Maine*, claimed to stop them *in transitu*. There were other transactions both of goods and bills between *Maine* and *Jean* before and during the time of the transaction in question. On the part of the defendant, the answer of the plaintiff to a bill in Chancery filed by *Brown* and *Jean* was read, whereby it appeared that on the 23d of *February* 1807, the plaintiff, being then a creditor of *Maine's* for about 600*l.* for goods before sold to him, applied for payment, when *Maine* requested a further advance of 1300*l.*, and proposed as a security for the payment of both sums to indorse and deliver over to him the bill of lading in question; which was agreed to, and the indorsement made accordingly; and the plaintiff thereupon gave *Maine* his acceptances to the amount agreed upon, payable some at 2, others at 3 months, which have been since duly paid. That *Maine* at the same time shewed the plaintiff the letter from *Jean* which inclosed the bill of lading of the wines (from which it was to be collected that there were mutual dealings between *Jean* and *Maine*, and that the wines were shipped on *Maine's* own account, and not as factor.) That it was agreed between the plaintiff and *Maine* that the plaintiff should be at liberty to insure the cargo for the benefit of both: which was accordingly done. The plaintiff also denied by his answer to his knowledge or belief, that at the time when the bill of lading was so indorsed and delivered to him by *Maine*, the latter had stopped payment, or was unable to pay his debts, or was under any pecuniary difficulties, or that he, the plaintiff, had any knowledge, belief, or suspicion of his insolvency. "That the plaintiff understood and believed at that time, that the pipes of wine in question had been sold to and purchased by *Maine* in the course of trade; and that although the plaintiff was aware, that they had not then been actually paid for by *Maine*, or by any other person; yet he concluded that the same would be paid for, or credit given to *Jean* by *Maine* in the course of their business together. That he, the plaintiff, then understood and believed that a running account subsisted between *Jean* and *Maine*, and that they were in the habit of supplying each other with goods of different kinds; and that *Jean* usually drew bills of exchange upon *Maine* at different times to the amount in which *Maine* was indebted to him for goods supplied." And the plaintiff further denied that, at the time when the bill of lading was indorsed or delivered to him, he knew, or believed, or suspected, or had reason to know, &c. that *Maine* would be unable to pay for the same. And he also denied obtaining the bill of lading by collusion with *Maine*. It was then objected at the trial, that it appeared by the plaintiff's answer that he knew at the time he received the bill of lading that *Jean* the consignor had not been paid for the goods, and therefore upon the authority of *Solomons v. Nissen*, 2 Term Rep. 674, that the assignee of the bill of lading took it subject to the consignor's right of stopping the goods *in transitu* in case of the insolvency of the consignee before payment. And Lord *Ellenborough*, C. J. left it to the jury to consider whether the indorsement were made by *Maine* to the plaintiff for a valuable consideration, and whether he had then notice of any circumstance which

ought in fairness to have prevented his taking it : and under this direction the jury found a verdict for the plaintiff. In the last term, a new trial was moved for, on the ground that the indorsee of the bill of lading, having actual notice of the non-payment for the goods by the consignee to the consignor, was thereby placed in the same situation as the original consignee himself, and subject to all the legal and equitable rights of the consignor against such consignee, and consequently subject to the consignor's right to stop the goods *in transitu* on the insolvency of the consignee ; although the bill of lading had been indorsed and delivered to the plaintiff for a valuable consideration : and the case of *Solomons v. Nissen*, *Ibid.*, was particularly relied on.

Garrow, Park, and Taddy, shewed cause on a former day against the rule for a new trial ; and insisted, that though the plaintiff, who was a creditor of *Maine's*, knew that the goods had not been paid for at the time when the bill of lading was indorsed to him by *Maine*, yet he also knew that they had been consigned to *Maine* on his own account, and not as factor merely, and that he had accepted bills drawn on him by *Jean* the consignor for the value of the goods in the regular course of business, which he had no reason to think would not be paid when due. He then took the indorsement of the bill of lading, *bona fide*, for a valuable consideration, without notice of *Maine's* impending insolvency, and without any intent to aid *Maine* in defrauding *Jean* the consignor. This transaction therefore stands on the authority of *Lickbarrow v. Mason*(a), where it was ultimately decided, and it cannot now be called in question, that indorsement and delivery of a bill of lading ; *bona fide*, transfers the legal property of the goods to the indorsee, so as to divest the right of the consignor to stop them *in transitu*. There *Freeman*, the consignee, never paid *Turing* the consignor for the goods, but had only accepted bills for the amount drawn on him by *Turing* which were running at the time when *Freeman* indorsed the bill of lading to *Lickbarrow* for a valuable consideration, and which acceptances were afterwards dishonoured. The legal title then of the indorsee of a bill of lading can only be impeached on the ground of fraud ; and that was the ground on which both the cases of *Wright v. Campbell*, 4 Burr. 2046, and *Solomons v. Nissen*, 2 Term Rep. 674, went. The former was the case of an assignment by a mere factor, without authority, and with strong suspicion of collusion on the part of the assignee. The latter was either a case of collusion between the consignee of the goods and his indorsee of the bill of lading, who had notice that the goods had not been paid for ; or at least, it was a case of partnership between them, in which view the latter was to be taken to stand in the shoes of the former with respect to the consignor, who had not been paid for his goods, and who ; therefore, according to all the cases, had a right to stop them *in transitu*. But all the Court there assented to the doctrine of *Lickbarrow v. Mason*. [*Bayley, J.* It was part of the agreement in *Solomons v. Nissen*, that *Solomons* should stand in the place of the original consignee and pay the consignor.] There could have been no question in any of the cases as to the consignor's right of stopping *in transitu*, if nothing short of actual payment by the consignee could have divested the right : but the property of goods passes to the vendee by the mere contract of sale, according to *Hinde v. Whitehouse*, 7 East, 558 ; and by *Shep. Touch.* 222. If the sale be for ready money, the vendor has a lien on the goods till the money is paid ; but not if the sale be upon credit till a future day. So here where the sale was upon

(a) 2 Term Rep. 63. 1 H. Blac. 357. 2 H. Blac. 211. 5 Term Rep. 367. 683, and 6 East 20, which last collects all the prior authorities in a note. It was also proved by the record of *Haille v. Smith*, in Error, 1 Bos. & Pull. 563, that by the custom of merchants bills of lading made out to the order of the shipper or his assigns are negotiable, and transferable by the shipper's indorsement, which vests the property of the goods therein named in the indorsee.

the credit of acceptances to be given payable at a future day, the vendor had no lien after such acceptances given. It appears then, that so far from the plaintiff having had notice, in any fraudulent sense, that the goods had not been paid for, at the time he took the assignment of the bill of lading, he had express notice that *Maine* had at that time complied with the terms of the contract of sale by having given the consignor his acceptances then running, upon the credit of which the consignor was content to part with the property of the goods to *Maine*. And as this is the common course of dealing with respect to foreign consignments, to determine against this plaintiff's right to hold the goods would be in effect to determine that bills of lading, though transferrable by law, should no longer be transferred; for if questions of equity, as between the consignor and consignee, are to be entered into against a bona fide indorsee of the bill of lading, there can be no safety in taking such a security, as there is if the legal title untouched by fraud is to prevail.

The Attorney-General, *Topping*, and *Bailey*, contra, relied upon the fact, that the plaintiff knew at the time he took the indorsement of the bill of lading that the goods had not been paid for, as distinguishing this from the case of *Lickbarrow v. Mason*; though they admitted, that if their objection prevailed, it would tend to narrow very much the doctrine supposed to be there laid down as to the general negotiability of bills of lading. But they contended, that it had been so narrowed in the case of *Salomons v. Nissen*, 2 Term Rep. 674. The intention of forwarding the bills of lading before the goods originally, was not to enable the consignee to assign them away without payment, but to put him in a condition to claim them on their arrival. The bill of lading in itself is nothing more than an undertaking by the Captain to deliver the goods to the order of the shipper; and it is hard enough upon him, whose right to stop *in transitu* in case of the insolvency of his consignee is acknowledged on all hands, that such right can in any case be divested by the consignee's assignment, without notice that the goods have not been paid for; but it has never yet been decided that the assignee, having that notice at the time, acquires by the assignment a better and more indefeasible title than the person from whom he received it: on the contrary, in *Salomons v. Nissen*, the fact of such knowledge by the assignee was held to take the case out of the rule of *Lickbarrow v. Mason*, and to subject him to the consignor's right of stopping *in transitu*. No other fraud was or could be imputed to the plaintiff in that case than what arose out of his knowledge that the goods had not been paid for; for he himself had actually given a valuable consideration for them to the consignee; and the opinion of each of the Judges was founded on that circumstance. With this limitation the rule established in *Lickbarrow v. Mason*, as to the negotiability of bills of lading, will become more useful and equitable. While every person must be taken to know that a bill of lading is transferrable, he must also be taken to know that the vendor has a right to stop the goods *in transitu*, if he have not been paid for them: but whether he have or have not may not be known. As against the consignee who has such knowledge, the consignor may stop the goods *in transitu*: then if his assignee have the same knowledge at the time he takes the assignment, how does his case differ in justice and reason from that of the original consignee? and if it be the same, though the present legal property may still pass by the assignment, it will still be subject to the consignor's contingent legal right of stoppage. But if the assignee take the bill of lading without knowing the state of the account between the consignor and consignee, then his present legal title will prevail against the contingent right of the consignor. In this view alone, the two rights will not be inconsistent or contradictory: but, without this restriction, the right of stopping *in transitu* will be rendered nugatory; and whenever the occasion has called for it, the general rule has been laid down with this qualification.

Cur. adv. vult.

Lord *Ellenborough*, C. J. now delivered the judgment of the Court. After stating the facts, and the questions submitted to the jury, with their finding—

The question is, whether the indorsement of the bill of lading in this case passed the property of the goods, the plaintiff having notice that the goods had not been paid for in money. It must be taken to have been found that the indorsement was, *bona fide*, for valuable consideration, and without notice of any circumstance which ought in fairness to have prevented the plaintiffs taking it; unless, indeed, notice that the goods had not been paid for in money be such circumstance. But to render this circumstance one which ought in fairness to have prevented the assignee of the bill of lading from taking it, it should have appeared that the consignor, by the terms of his dealing with the consignee, had bargained for, or expected that the payment should precede the assignment of the bill of lading. But if we look to the actual facts of the case, as between the consignor and consignee, by the memorandum at the foot of the invoice transmitted before the bill of lading, (and which arrived on the 3d of *January* 1806), the price of the goods was payable in bill on *London* at 3 months from 20th *December*;" and at the time of the assignment *Maine*, the consignee, had done all that such bargain required, by having accepted a bill on *London* at 3 months from the 20th of *December*, which was not due at the time of the indorsement of the bill of lading on the 23d of *February*. If therefore the plaintiff had known all the circumstances of the case, as they stood between consignor and consignee, he would have known nothing which would have made it unfair in the consignee to assign, or in himself to accept, the assignment of the bill of lading. If he had assisted in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, it would have been otherwise, and he would in that case have stood in the same situation with the consignee. If, for instance, he had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid; in that case the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would have been an act done in fraud of the consignor's right to stop *in transitu*, and would therefore have been unavailable to the party taking an assignment of the bill of lading under such circumstances, and for such purpose: but here, any knowledge or suspicion of the kind on the part of the plaintiff is negatived expressly by the plaintiff's answer read on the part of the defendant. And if a bill of lading should be held by us not assignable under these circumstances, the consequence would be that no bill of lading could be deemed safely assignable before the goods arrived, unless the assignee of the bill of lading was perfectly assured that the goods were paid for in money, or paid for in account between the parties, which is the same thing: a position which would tend to overturn the general practice and course of dealing of the commercial world on this subject, and which is warranted, as we conceive, by no decided case upon the subject. The case of *Salomons v. Nissen*, 2 Term Rep. 674, was a case of fraud on the part of the plaintiff, who had taken an assignment from the vendee, not only knowing the goods were not paid for, but by his own agreement taking upon himself personally the immediate duty of paying for them: and he afterwards brought his action to take the goods out of the hands of the defendant, the vendor, without having paid for them, in fraud of the terms of his own express agreement with the original vendee, with whom he had become partner in profit and loss as to these goods, and with whom he had expressly contracted that he would himself pay for them. This case, therefore, being a case of express fraud and *mala fides*, affords no principle to govern the present case, in which the absence of fraud and *mala fides* is found. The doubt which had been thrown on this subject

has arisen principally from the words, "*without notice*," which are to be found in the case of *Salomons v. Nissen* and other cases on the subject. But we think that, according to the general scope and meaning of the passages in the opinions of the Judges where this expression occurs, it is not to be understood in the restrained sense contended for; viz. "*without notice that the goods had not been paid for*;" but, "*without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable*." The criterion being, according to Mr. Justice Buller, in that case, (p. 681). *Does the purchaser take it fairly and honestly?* And so understanding such expression, or at any rate so understanding the rule of law on the subject, we think that in this case no circumstance appears to have existed at the time of the assignment of this bill of lading which should have prevented the plaintiff from taking it, or which should now render it not available in his hands. We are of opinion, therefore, that the rule for a new trial in this case should be discharged.

The King v. Dodd.

9 East, 516. May 30, 1808.

Whether or not the particular schemes denounced by the stat. 9 G. I. c. 18. s. 18, as *manifestly tending to the common grievance, prejudice, and inconvenience*, of great numbers of subjects in their trade and other affairs; such as the raising a great sum by subscription for trading purposes, and making the shares in the joint stock transferrable; be in themselves unlawful and prohibited, without reference to the fact of such tendency in the particular instance in the opinion of a Court and jury; at any rate, the inviting of such subscriptions by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective shares, seems to be an offence within the act. But as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to this application, the Court refused to interfere by granting an information, though they discharged the rule without costs.

THE defendant, sometime in the year 1807, published and circulated two different schemes; one of them, entitled, "Prospectus for the *London Paper* "Manufacturing Company;" the other, "A Prospectus of the intended *London* Distillery Company for making and rectifying genuine *British* Spirits, "Cordials, and Compounds." By the first of these it was proposed, amongst other things, to raise by subscription 50,000*l.* by twenty five hundred transferable shares of 50*l.* each, payable by instalments not exceeding 10*l.* per cent.: the whole to be under a deed of trust or enrolment in chancery; "by which no party (it was said) could be accountable for more than the sum subscribed under the regulations therein stipulated;" and the persons qualified to be chosen directors by the amount of their shares were to be taken in the rotation in which they subscribed. The great advantages of this scheme over other paper manufactories were extolled throughout the prospectus. The other scheme, for a Distillery Company, which was also held forth in terms of extravagant praise to attract popular favour, proposed to raise 100,000*l.* by two thousand transferrable shares at 50*l.* each, payable by instalments not exceeding 10*l.* per cent. at twenty days notice; to be in like manner under a deed of trust enrolled in Chancery, "by which no party was to be accountable for more than the sum subscribed under the regulations stipulated therein." This also was to be under the management of directors properly qualified, to be nominated in rotation as they subscribed. Annexed to the former scheme was a supposed report to the directors of the *London* Distillery Company from the defendant, stating that he had begun in *May or June* 1807 taking in 12. subscriptions; and speaking of the large sums which would be required for the purchase of premises, &c.; and naming different individuals, amongst others himself, to be elected to the principal employments in the concern.

The Attorney-General (on the part of a private relator), moved the Court

on a former day for a criminal information against the defendant as the framer and promoter of these schemes, which he contended to be against the express provisions and plain policy of the stat. 6 Geo. 1. c. 18. s. 18, and supported the application by an affidavit verifying the issuing of these printed proposals by the defendant, to whom application was made by the deponent for information respecting the nature of them, and from whom he received a prospectus as to the paper manufactory. That the deponent agreed to subscribe to it, and paid the defendant 5*l.* as for an instalment of 10*l.* per cent. on a transferable share of 50*l.* And in answer to an inquiry by the deponent what return would be made if the scheme did not succeed, the defendant answered 2 1-2*l.* per cent. on each share: and at the same time mentioned that the subscriptions to the distillery scheme which he had to offer to the public had been all full three months before, and that the shares bore a premium, but he thought he could get the deponent one for a premium of 10*l.* or 20*l.* Facts of a similar nature were also sworn to, with respect to the defendant's taking subscriptions for the distillery scheme in a book kept in an office for that purpose, and for which a clerk in the office delivered receipts purporting to be signed by the defendant as surveyor; and that at the same time the defendant came into the office and conversed with another person present on the nature of the undertaking, who also subscribed.

The stat. 6 Geo. 1. c. 18. s. 18.(a), on which this application was founded, reciting that "whereas it is notorious that several undertakings or projects of different kinds have at times since *June* 1718 been publicly contrived and practised, or attempted to be practised, within *London* and other parts of the kingdom, as also in *Ireland*, and other dominions of the king, which manifestly tend to the common grievance, prejudice, and inconvenience of great numbers of subjects in their trade or commerce or other their affairs; and the persons who contrive or attempt such dangerous and mischievous undertakings or projects, under false pretences of public good, do presume according to their own devices and schemes, to open books for public subscriptions, and draw in many unwary persons to subscribe therein, towards raising great sums of money; whereupon the subscribers or claimants under them do pay large proportions thereof, &c.; which dangerous and mischievous projects relate to several fisheries and other affairs wherein the trade, commerce, and welfare of the subjects, or great numbers of them, are interested. And whereas in many cases the said undertakers or subscribers have presumed to act as if they were corporate bodies, and have pretended to make their shares in stocks transferrable or assignable without any legal authority, &c." (Then after stating some instances of illegal acting under obsolete or pretended charters;) and many other unwarrantable practices, too many to enumerate, have been and may hereafter be contrived, set on foot, proceeded upon, to the ruin of many subjects, &c. And whereas it is absolutely necessary that all public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of the subjects in general, or great numbers of them, in their trade, commerce, or other lawful affairs, be effectually suppressed," &c. For remedy enacts, "that all and every the undertakings and attempts described as aforesaid, and all other public undertakings and attempts tending to the common grievance, prejudice, and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things whatsoever for furthering, countenancing, or pro-

(a) Mr. Justice *Blakstone*, in B. 4. c. 8 of his Commentaries, says that this statute was enacted in the year after the infamous *South Sea* project had beggared half the nation. It was observed, however, in the argument, from *Anderson's History of Commerce*, that the *South Sea* bubble, as it was called, burst after the act was passed, which was in 1718, two years after the failure of *Law's* project in *France*.

"ceding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body, the raising, or pretending to raise, transferrable stock, the transferring, or pretending to transfer or assign, any share in such stock, without legal authority, &c. shall be deemed illegal and void, &c."

S. 19. enacts, that all such unlawful undertakings and attempts so tending to the common grievance, &c. shall be deemed public nuisances, and subjects the offenders to the penalties of *præmunire*, in addition to the fines, penalties and punishments of persons convicted of common and public nuisances. And subsequent clauses give other remedies in respect of these grievances. With a proviso (s. 25.) that the act shall not be construed to prohibit or restrain the carrying on of partnerships in trade, in such manner as had been before usually and may legally be done.

Garrow, Park, Jervis, Lawes, and Adolphus shewed cause against the information, and denied that there was any apparent mischievous tendency or public grievance in these schemes, (the one of which was to supply better and cheaper paper, and the other to supply better and cheaper *British* spirits to the public than they had at present;) without which they were not within the letter, and still less within the spirit of the law. The relator does not pretend to say, that the money was attempted to be raised, without any real intention to apply it to the purposes in view, in fraud of the subscribers; or that the schemes themselves are impracticable and fallacious; but the objects which are openly avowed are such as, if realized, must not only be advantageous to the subscribers, but to the public at large. They are fair objects of trade, meant to be obtained by fair competition with other traders; but as a larger capital was required than it is in general practicable for a few private partners to raise, it was proposed to accomplish it by inviting many subscribers to form a joint stock. Then if the object were legal, and it would have been legal for any number of persons to have met by appointment and entered into partnership for this purpose, as they may for any purpose of trade, (except in the coal trade, and in that of bankers, and of insurance, under different acts), the mere circumstance of inviting others by advertisement to join them, in such an undertaking cannot make it unlawful, nor the defendant's mistake of the law in supposing that each partner would only be accountable for the joint debts incurred to the amount of his subscription. Then the circumstance of this association, if legal in its object, and beneficial in its nature and tendency, being to be accomplished *by transferrable shares*, is not in itself made illegal by the act of Parliament, unless the Court see clearly that it has, in the words of the act, a manifest tendency to the common grievance, prejudice and inconvenience of the public. It is only put by way of example amongst other means which may have that tendency; but still the Court must be satisfied that the scheme itself to be promoted by those means has such mischievous tendency. They also dwelt on the hardship of instituting a prosecution of this sort upon a statute, which, except in the instance of a prosecution against *Caywood*, 1 Stra. 472, and 2 Ld. Ray. 1361, within two years after it passed, does not appear by any case in print to have been acted upon: and he is there represented to have been a projector of an unlawful undertaking to carry on a trade to the North Seas whereby *many* of his Majesty's subjects have been *defrauded* of great sums. And they urged that the Court would not put in force so penal a law at the instance of a private relator, who had himself voluntarily, without solicitation from the defendant, or any one connected with him, become a subscriber, with a view, as it seemed, of preferring his complaint; when if the evil were of magnitude sufficient to call for public redress, the *Attorney-General* might file an information *ex officio* against the offenders.

The Attorney-General, Best, Serjt. and Abbott, in support of the rule, premised that the only probable reason why this branch of the statute had not

been acted upon for so long a time was because it had corrected the evil it was intended to suppress, till now of late when it had shewn itself again, and it was again necessary, in proportion as schemes of this sort multiplied (and the public had heard of others on foot besides those in question), to put this wholesome law in force. They then argued from the wording of the statute, that the Legislature meant to prohibit altogether projects of this nature, described by certain *indicia* as tending in their nature to the common grievance, prejudice and inconvenience of the subject. It states, that it was *notorious* that projects of different kinds had been of late practised, or attempted to be practised, which *manifestly* tended to the common grievance, &c. that the persons who continued or attempted such *dangerous and mischievous* projects, under *false pretences of public good*, (and such are blazoned forth in these schemes), presumed to *open books for public subscription*; and they drew in the subscribers or claimants under them to *pay small proportions thereof*: some of them, it is said, presumed to act as corporate bodies, and had pretended to *make their shares in stocks transferrable* without any legal authority. All these acts, which are to be found in the present case, are declared to be dangerous and mischievous. But then the legislature go on further to recite more generally, that it is necessary that *all public undertaking and attempts tending to the common grievance, &c.* of the subjects in their trade or lawful affairs should be suppressed: and then it enacts for remedy, that *all undertakings and attempts as aforesaid*;" (which must mean all those particularly described in the first part of the preamble,) "and all *other public undertakings tending to the common grievance*," &c. (which evidently points to the general words at the conclusion of the "preamble,) "and all other matters and things whatsoever for furthering, "countenancing, or proceeding in any such undertaking;" and *more particularly (inter alia)* the pretending to raise *transferrable stocks*, or to *assign shares in such stocks, &c.* without authority of Parliament or of the Crown, are declared to be illegal and void. That the particular acts described are in themselves unlawful, as being assumed to have a mischievous and dangerous tendency, is further evident from the 21st section, which subjects to punishment any broker who shall act as such in contracting for the sale or purchase "of any share or interest in any of the undertakings by the act declared to be unlawful." But unless the particular acts themselves described are to be taken as expressly prohibited without any reference to what a jury may consider as their tendency, how is a broker to know whether a jury will consider them as *tending to the common grievance*, so as to govern his conduct in exercising his business of a broker. But if the construction of the act were otherwise, it cannot be doubted that these schemes come within the spirit of it. They hold out a false lure to the subscribers, that they shall not be answerable for more than the amount of their shares, which is calculated to ensnare the unwary; while extravagant hopes of gain are proclaimed to allure the greedy; and adventurous persons of small property are drawn in by the facility held out of paying their subscriptions by small instalments; which is one of the mischiefs intended to be prevented by the act. There are also mischiefs of a more general nature affecting others than the subscribers themselves; for when a multitude of persons are engaged in a commercial adventure with transferrable shares, it is next to impossible for those who deal with them to know to whom they are giving credit, or for the members themselves to know the extent of their own responsibility. It is impracticable for 500 persons to sue or be sued with effect. And the individual shareholder does not get rid of the evil by parting with his share; as he still remains liable not only for the partnership debts contracted during the time he held it, but also for those contracted afterwards with one who may have continued to deal with the company on his credit, not knowing that he had ceased to be a partner. One of the special objects of the act therefore was to prevent num-

bers of persons clubbing together with transferrable shares for the purpose of carrying on trade. It was considered as a crafty expedient to enable the projectors, after having possessed themselves of the joint stock and subscription funds, to withdraw themselves from responsibility but if the shares are not transferrable, then the loss and ruin will fall, as it ought, upon the original projectors. One object of the legislature was to secure simple individuals against the ruinous consequences of such projects, where great hopes are held out to the public on false foundations; a large fund to be collected by numerous subscriptions of small sums, of which the chief projector is to retain a principal share in the management; and the shares to be transferrable in order to facilitate the escape of those who are in the secret, and to make redress more difficult and fruitless. Another object was to secure the public. Legal corporations are known, and can be made responsible by their property, and punished by the forfeiture of their charter; but bodies of this sort indefinitely numerous and having only individual existence, can with difficulty be traced and cannot afford the same protection to the public who deal with them.

Lord ELLENBOROUGH, C. J., at the conclusion of the argument observed that it was a question of considerable novelty upon the construction of the act, which, though of some standing, could not be considered as obsolete: yet the long period which had intervened since the passing the law, and the little use which appeared to have been made of it, might perhaps afford some excuse for this party, and for others who of late may have been engaged in similar projects, if it should appear that they had fallen unawares into the commission of an offence. The Court would therefore take into consideration, first, whether the acts imputed to the defendant were illegal; and next, whether under the circumstances it might be proper to grant the information prayed for. The first question was of very extensive consequence, as it might affect other cases: and the Court would wish their decision to have as much public benefit with as little private inconvenience as possible. Two days afterwards his Lordship delivered the opinion of the Court to this effect.

The case has been very fully argued, and the application for an information has at least had this good effect, that it has produced a full discussion of the question, and has given a general notoriety to the existence of the statute of the 6th of Geo. 1., so that no person can hereafter pretend to say that it is an obsolete law, and on that account no longer to be enforced against such as offend against the provisions of it. After a lapse, however, of 87 years since any authenticated proceeding has been had upon this branch of the act, and when other ways are still open to the party now applying to put this act in force against offenders, the Court, in the exercise of a sound discretion, under all the circumstances of the case, will forbear to interfere in this extraordinary manner. But at the same time we wish it to be understood that it is not because we think that the facts brought before us are not within the penalty of the law(1): but we choose to express ourselves with the greater reserve, because the defendant may still be indicted, and the Court may still be called, upon the removal of the indictment by *certiorari*, or upon an information filed by the Attorney-General, to give their opinion on this very case. But independent of the general tendency of schemes of the nature of the project now before us to occasion prejudice to the public, there is besides in this prospectus a prominent feature of mischief: for it therein appears to be held out that no person is to be accountable beyond the amount of the share for which he shall subscribe, the conditions of which are to be included in a deed of trust to be enrolled. But this is a mischievous delusion, calculated to ensnare the unwary public. As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility; but as to the

(1) Vide *Buck v. Buck*, 1 Campb. 547.

rest of the world it is clear that each partner is liable to the whole amount of the debts contracted by the partnership(1). I forbear to comment on lesser circumstances; such as the smallness of the sum to be subscribed in the first instance, which seems to carry an appearance of holding out a lure to the unwary; and other features in the case. But considering that this is brought forward after a lapse of so many years since any similar prosecution was instituted, and brought forward by a party who does not profess to have been himself deluded by the project; and the statute having been passed principally for the protection of unwary persons from delusions of this kind; the Court think, in the exercise of their discretion, that they should not now enforce the statute against this defendant at the relation of a person so circumstanced: leaving the relator to the common law remedy by indictment, or the defendant to be proceeded against by his Majesty's Attorney-General *ex officio*, if he should deem it advisable for the protection of the public. But the Court think it is fit that this rule should be discharged without costs. And they recommend it as a matter of prudence to the parties concerned, that they should forbear to carry into execution this mischievous project, or any other speculative project of the like nature, founded on joint stock and transferrable shares: and we hope that this intimation will prevent others from engaging in the like mischievous and illegal projects.

Rule discharged, without costs.

Lloyd v. Maurice.

9 East, 528. May 30, 1808.

The *English* notice required by the stat. 5 G. 2. c. 27. s. 4, is to be on the copy of the process, and not on the writ itself; and the service of such copy without the notice is irregular and will be set aside; though the Court discharged a rule for quashing the writ itself on this account.

THE *Attorney-General* shewed cause against a rule for quashing a writ of *latitat*, because the copy of the process served on the defendant had not the *English* notice on it required by the statute 5 Geo. 2. c. 27. s. 4.: and admitted that the service of the copy was void for want of such notice on the copy of the writ served, as is required by the act; but contended that the writ of *latitat* itself which, in fact, had such notice upon it, was good: and the act only requires the *English* notice to be on the copy served.

W. E. Taunton said, that the act meant to identify the copy of the writ served with the writ itself in this respect. The only use of the *English* notice was on the copy of the process served; it was useless, and not required by the act, on the writ itself.

The Court agreed, that the *English* notice was only required to be on the copy of the process served, and need not be on the writ itself; and that for want of such notice the service of the copy was irregular: but the writ itself being perfect when issued could not be quashed; and therefore this rule must be discharged.

MEMORANDUM.

AT the end of this term, *Wm. Manley*, Esq. of the Middle Temple, and *Albert Pell*, Esq. and *Wm. Rough*, Esq. of the Inner Temple, were called Serjeants, and took for their motto "*Pro Rege et Lege*."

(1) [See 4 S. & R. 366, *Hess v. Werts*.—W.]



J U D G E S
OF THE
COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

EDWARD Lord ELLENBOROUGH, Chief Justice.

Sir NASH GROSE, Knight.

Sir SIMON LE BLANC, Knight.

Sir JOHN BAYLEY, Knight.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knight.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knight.



CASES

IN

TRINITY TERM,

IN THE FORTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

GREAT inconvenience having been felt on several occasions for want of a sufficient promulgation of the following rule, it is inserted here to aid the Practitioners at the Sittings.

REGULA GENERALIS.

HILARY TERM, 44 GEORGE 3, 1804.

IT IS ORDERED by the Right Hon. Lord *Ellenborough*, C. J. &c. that in future no cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule for such special jury be served, and the cause marked in the Marshal's book as a special jury, on or before the day preceding the adjournment day in *Middlesex* and *London* respectively.

Golding v. Dias, in Error.

10 East, 2. June 18, 1808.

An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3 H. 7. c. 10, which is confined to judgments recovered by *plaintiffs* below and affirmed on a writ of error. Neither is such defendant in error entitled to his costs on the stat. 8 & 9 W. 3. c. 11. s. 2. which is confined to judgments for defendants on *demurrer*.

IN replevin in *C. B.* the defendant made cognizance for rent in arrear, and had a verdict and judgment pursuant to the stat. 17 Car. 2. c. 7., which judgment was affirmed on a writ of error brought by the plaintiff in this court.

Lawes shewed cause in the last term against a rule praying that the defendant in error might be allowed interest on the sum recovered by the judgment below, by force of the stat. 3 H. 7. c. 10.; which, reciting that writs of error were often brought for delay, enacts that if any *defendant* or *tenant*, against whom judgment is given, *sue* any writ of error to reverse it, in delay of execution; if judgment be affirmed, &c. the person against whom the writ of error is sued shall recover his *costs* and *damages* for the delay and vexation. This statute, he contended, as well as the statutes 3 Jac. 1. c. 8, and 16 and 17 Car. 2. c. 8. giving costs in error, had always been confined to cases where judgments had been recovered by the original plaintiffs(a) below which were

(a) Vide *Baring v. Christie*, 5 East, 545, on the stat. 13 Car. 2. st. 2. c. 2. s. 10.

afterwards affirmed in error, and not to judgments recovered by defendants below: for which *Cone v. Bowles*, 4 Mod. 7, 8, is in point; which was not shaken by *Bodley v. Ballamy*, 1 Blac. Rep. 268. And in *Bristow v. Waddington*, 2 New Rep. 360, interest on the affirmance of a judgment in the Exchequer chamber was denied, where the plaintiff below had recovered unliquidated damages.

J. W. Warren, in support of the rule, contended that the judgment below, being to recover damages for rent in arrear, was in effect a judgment for liquidated damages, and came within the words and meaning of the statute of H. 7. And that this was distinguishable from *Cone v. Bowles*, where the judgment was *pro retorno habendo*, and not for damages. And in *Shepherd v. Mackreth*, in the Exchequer Chamber, 2 H. Blac. 284, the stat. 3 H. 7. c. 10., and all the subsequent statutes giving costs in error, were considered as made *in pari materia*; the latter being merely in extension of the former, and making it discretionary in the court of error to give interest or not on the affirmance of the judgment below in personal actions.

The Court, however, were of opinion that the statute of Hen. 7th applied only to cases where the judgment below was for the plaintiff, and that none of the subsequent statutes had extended the description of persons to whom relief was meant to be given by that statute. And that the case of *Cone v. Bowles*, which was decided after the statutes of Jac. 1, and Car. 2, had settled the question, that an avowant in replevin for whom judgment below was given, which was afterwards affirmed in error, was not within the statute; and therefore they discharged that rule(a).

The defendant in error then applied to the master to have his costs in error taxed under the stat. 8 & 9 W. 3. c. 11. s. 2, which gives costs in error to the defendant, where the judgment below is for him and is affirmed on error. But the master thought that this statute applied only to cases where the judgment below was upon *demurrer*, and not where it was after verdict, and refused to tax the costs. Thereupon

J. W. Warren now moved for a rule to shew cause why the Master should not tax the defendant's costs in error, on the ground that the object of the second section of the act of *William* was twofold; the first was to give costs to defendants below; where it could only look to cases of judgment on *demurrer*: because in all other cases of judgment for a defendant, he was already entitled to costs by previous statutes. The second object was to give costs to defendants in error generally; because in no case was a defendant in error before entitled to costs on affirmance of his judgment below, whether after verdict, nonsuit, or demurrer. The Court therefore will not restrain the beneficial operation of the act to affirmance of judgment on demurrer, unless that necessarily appears to have been the intention of the legislature. The word of reference in the second part of the clause, "any such action," &c. will be satisfied by construing it to mean "any action brought in any court of record," without extending it to the subsequent description, "wherein on any demurrer," &c. And he referred to 2 Tidd, 1134, 3d edit. and 2 Sellon, 565, to shew that this construction had prevailed in practice. But

The Court, said that taking the whole context of the clause together, it was evident that it only related to judgments given on *demurrer* for defendants below to whom remedy was intended to be given for their costs, both below and above, on affirmance of such judgment, which they had not before: and therefore

Refused the Rule.

(b) Vide *Baring v. Christie*, 5 East, 545.

Newman v. Morgan.

10 East, 5. June 20, 1808.

At common law grass is titheable in grass cocks after having been *tedded* in the course of the process of making it into hay.

THIS was an action on the case, brought by the plaintiff, as occupier of certain lands in the parish of *Hornchurch* in *Essex*, against the defendant, as farmer of the tithes of the same parish. The first count stated, that after the occupiers of lands in the parish had gathered the tithes of grass growing thereon into heaps, the rector, after notice, had been used to make the same into hay. That the plaintiff had mowed rye grass and clover at the time mentioned in the declaration, and gathered the tithes into heaps, and gave notice thereof to the defendant, who neglected to make the same into hay, but permitted it to rot on the ground, whereby the plaintiff was damaged, &c. A second count charged that the defendant neglected to take away the tithes of hay from the plaintiff's ground after the same had been duly set out, and notice given to him by the defendant, &c. At the trial before *Heath, J.* at *Chelmsford*, the plaintiff's counsel, in opening the case, stated that the tithes had been set out from the swarth in grass cocks: when the learned Judge said that, if such were the fact, he should nonsuit the plaintiff; for the plaintiff ought first to have tedded (a) or made it into hay: and a witness, who was afterwards called for the plaintiff, proving that the tithes were set out from the swarths into grass cocks, without any tedding or making of the same, the plaintiff was nonsuited.

This nonsuit was moved to be set aside in the last term, upon the ground that the common law did not require any degree of labour to be applied to the grass, in the process of making it into hay, before it was tithed, but only the severance of the tenth part from the nine in grass cocks, in order that the parson might remove it, or make it into hay at his own expence. And a rule *nisi* was granted: against which

Shepherd and Best, Serjeants, now shewed cause, and denied that the common law rule of tithing hay was satisfied by the mere division of the grass, as cut, into ten parts: for though it is not required to make it into hay, yet before it is put into grass cocks it ought to be properly manufactured for that first state in the process of hay making, in the same manner as the farmer himself would deal with his own nine parts. The tedding or scattering it abroad after it is cut in the swarth is for the purpose of drying it in a certain degree before it is put into grass cocks, and without which process it must be deteriorated. It would even be injurious to the farmer to rake the raw and wet grass into cocks without such previous drying, which would cause it to heat and ferment, and would induce the necessity of immediately reducing it again to its first stage, in order to preserve it for making it into hay. The universal method of treatment in this respect shews what the common law requires. Without this previous scattering abroad and drying, the cocks would not be made equal, as there is often a considerable difference in the swarth in different parts of the field. [The Court intimating their concurrence with the argument of the plaintiff's counsel, the latter refrained from discussing the authorities with which they were furnished, and which were only alluded to generally.]

Garrow and Marryat, in support of the rule, admitted that the tithe could

(a) To *ted*, from the Saxon *teadan*, to prepare, to lay grass newly mown in rows. Hay-makers following the mowers, and casting it abroad, they call *tedding*. *Johnson's Dict* cites *Mortimer*.

not be taken of the grass in the swarth, because of its inequality: but contended that it was lawful at common law for the farmer to set out the tithe in the first stage when the grass is capable of being put into equal heaps, before any labour was applied towards making it into hay. And though the swarth may be unequal in different parts, yet there is no difficulty in collecting it into equal heaps by raking more together into those heaps where the swarth is thinnest: and no injury can arise to the tithe owner, as he may begin counting the heaps where he pleases. The course pursued by the defendant did not preclude the plaintiff from sending his own labourers into the field to make his tenth part into hay; but it is admitted, that the farmer is not bound to labour for the tithe owner for that purpose: and if not for the whole process, why for any part of it, as tedding it? There was no fraud in this case; no intention of spoiling the tithe of the grass; nor is it capable of being injured by severing the swarth immediately into heaps, if the tithe owner be ready with his own labourers, as he ought and is required to be, either to remove or to make it into hay on the land(a): the farmer must do the same by his nine parts. A custom for the farmer to ted the grass of the first mowing for the rector may be a legal foundation for an exemption from tithe of the second mowing: as in *Hall v. Fettyplace*(b); where the custom was laid to be for the farmers to cut down the grass, "and the said grass to ted and shake abroad, and the said grass so dispersed and cast abroad, to gather into weoks and windrows, and to put into small cocks *et post primam circumlationem inde*, the tenth cock *inde* to set forth for the parson, in satisfaction of all tithes, as well of the first as of the latter mowth of that meadow, for the same years." And on demurrer it was moved that the prescription was not good, because no more was given to the parson than he ought to have. But because it was alleged "that the farmer at his own costs had tedded and shaken it abroad, and gathered it into weoks and windrows, and made it into little cocks," and so was at a greater labour and charge than the law appoints, and the parson hath benefit by the said labour, it was adjudged a good cause of discharge. Now the custom there alleged is, exactly what is here claimed by the rector to be done as of common right. [Lord Ellenborough, C. J. That must depend on what was understood by "*post primam circumlationem inde* (c)." The case there cited, of *Johnson v. Aubrey*, Cro. Eliz. 660, as all one with the case at bar, was a custom for the farmer to make the first mowth into hay, and set out the tenth cock of hay, in satisfaction of the tithe of the latter mowth.] The same point was adjudged 14 years afterwards in *Hide v. Ellis*, Hob. 250, where it more distinctly appears that the custom set up was to do no more than what is now claimed as of common right; viz. "to cut the grass, and strew it abroad, called *tedding*, and then to gather it into winreves, and then to put it into grass cocks in equal parts, without fraud, and then to set out every 10th cock great or small to the parson." [*Le Blanc*, J. That case is cited by Lord Rolle in 1 Rol. Abr. 644: but he refers to several other cases as having decided the contrary.] If any thing be required to be done beyond the severing of the grass into ten parts by raking into grass cocks from the swarth, it may as well be made into hay; which is not contended for(d). But

(a) In *Crabb v. Hayne*, H. 16 G. 2, 1742, the Court held that where the tenant had set out his tithe of hay in grass cocks only, the parson had a right to make it into hay on the tenant's land. *Webb v. Gordon*, in 1714, S. P. 2 Wood. 5.

(b) Cro. Jac. 42, and vide *Green v. Austin*, *ib.* 116.

(c) Something was meant more than *tedding*; which is admitted to be the first scattering abroad out of the swarth, and before the grass so tedded is put into grass cocks. That operation is previously described in the custom as here stated. Therefore what follows, viz. "*et post primam circumlationem inde*," must mean after the first scattering abroad from the small cocks so before tedded; and then the tenth cock *inde*, (that is, when made again into cocks from such last mentioned scattering abroad out of the small cocks so before tedded) was to be set out for the rector.

(d) It was once said, 1 Rol. Rep. 173, that the parishioner ought to make the grass into

where, in *Fox v. Ayde*, 2 P. Wms. 322, it was objected that the parisoners *de jure* ought to make the tithe grass into hay; Lord King, C. declared the law to be otherwise, and that all that the parisoners were bound to do was "to cut down the grass, and divide it into ten parts; after which the parson was to make it into hay." And it is a sufficient check against fraud that the farmer must put his own nine parts of the grass into cocks from the swarth, as well as the rector's tenth part. It may not always be necessary to ted the grass at all before putting it into grass cocks.

LORD ELLENBOROUGH, C. J. If, from the state of the weather and the condition of the grass, tedding were not necessary before it was put into grass cocks, the plaintiff should have shewn that: but as no evidence of that kind was offered, we must take the fact to be, that the usual method of treating the grass after it was cut, by tedding it before it was put into grass cocks, in the common process of making it into hay, was proper to have been pursued in the present instance, and that it was done. It appears to me that the learned Judge correctly laid down at the trial the common law principle of tithing as applied to this case. It cannot be, that all that is necessary to be done by the occupier is to cut down the grass and divide it into ten parts, as Lord Chancellor King is supposed to have said in the case cited. Nobody contends, that it is sufficient to give the rector the tenth blade of grass, or that it is to be tithed in the swarth, which is often so unequal that it cannot be fairly divided. The rule then is for the rector to take his tenth part in that first convenient stage of the process when the subject-matter may be equally divided, and that is when it is put into grass cocks in the common process of hay-making: and it is agreed on all hands, that the usual course is for the grass to be tithed after it is cut before it is made into grass cocks. This may possibly not be necessary under extraordinary circumstances of weather; but where that is so, it ought to be shewn. It is said, however, that tedding was held not to be necessary in *Hall v. Pettyplace*, and *Hide v. Ellis*. That does not so distinctly appear by the former of those cases: but at any rate, the authority of them is questioned by Lord Rolle in his Abridgment, who refers to other cases where the contrary was adjudged. In addition to which the doctrine of *Hide v. Ellis* has been expressly contradicted in a modern case, that of *Brook v. Power*, 4 Wood's Exch. Tithes Cases, 91; where in answer to a bill filed by the rector of *Fryern Barnet* for an account of tithes in kind, amongst others for the tithe of hay, the defendant *Power* stated, that in 1772 he mowed a field of grass, and put the produce into grass cocks, and gave the plaintiff notice that he was ready to set out the tithes thereof: that the plaintiff thereupon attended, and desired to know whether such grass had been tithed abroad and raked in before it was cocked; and on being informed that it had not, but that the same was cocked out of the swarth, he refused to take it in that way. That the defendant being informed by some of the oldest inhabitants of the parish that such had been the custom, refused to set out the tithes in any other manner. But the Court, after hearing witnesses, ultimately decreed the defendant to account for the tithes. The Court therefore pronounced on the mode of setting out the tithe of hay there claimed by the rector, as the law obligation; that the subject-matter first presents itself in a titheable shape when put into grass cocks, and that *tedding* is necessary before it is put into such cocks.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. The rule laid down by the learned Judge at the trial is the common law rule; and where there are any exceptions to it, those must be shewn. The same rule was also recognized in a case of *Blaney v. Whitaker*, which was tried on the Western Circuit, and came before this Court on a motion

hay; but vide *Smithson v. Dodson*, 9 Mod. 117. 2 Blac. Com. 29, and *Bendict v. Kemble*, 2 Wood's Exch. Tithes Cases, 346.

for a new trial in *M. 23 Geo. 3.* "It was an action on the case against the parson for not taking away the tithe of turnips after they had been set out. The turnips had been drawn to feed cattle, and every tenth turnip was thrown aside as drawn on a ridge opposite the parson. The question was, Whether the tithe were properly set out? The parson contending that the turnips ought to be set out in heaps, or at least gathered into heaps for him. Mr. Justice *Ashhurst* said, that in *hay* and corn, the farmer must put it into *cocks* and sheaves, for his own benefit, and therefore he shall do the same for the parson; but that a man was not obliged to bestow more labour than the nature of the thing required for the benefit of the parson: and that this agreed with the cases. Mr Justice *Buller* said, that he entirely agreed with his Brother *Ashhurst*. That if the farmer put them into heaps for himself, he should do so for the parson: but if he did not do so for himself, he need not do so for the parson. That the rule of law was, that things should be tithed as soon as they were in a proper state to be tithed: the same was the case with hay and corn. The rule for a new trial was discharged." When, then, is this subject-matter in a proper state to be tithed? When it comes into grass cocks in the ordinary course of the process of making it into hay; that is, by the first turning over the swarth after it has been cut, that the under side may be exposed to the action of the sun and air; which I take to be tedding it; and in that state only (I do not speak of extraordinary cases) can it properly be put into grass cocks. The case cited by my Lord out of *Wood's* collection lays down the same rule: and that has settled the question, and removed the doubt which might have existed upon the earlier cases referred to in argument; which, however, Lord *Rolle* states to have been contradicted by other decisions which he mentions.

BAYLEY, J. assented.

Rule discharged.

Whiteacre, on the Demise of Boulton, v. Symonds.

10 East, 13. June 20, 1808.

A landlord of premises about to sell them gave his tenant notice to quit on the 11th of *October* 1806, but promised him not to turn him out, unless, they were sold: and not being sold till *February* 1807, the tenant refused on demand to deliver up possession: And on ejectment brought; held that the promise (which was performed) was no waiver of the notice, nor operated as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice if necessary; and therefore, that the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit.

THE day of the demise in this ejectment was laid on the 12th of *October* 1806, and at the trial before *Grose, J.* in *Suffolk*, it appeared that the defendant had for many years held the premises in question, consisting of a cottage, barn, and about five acres of land, as tenant from year to year, of the lessor of the plaintiff: who being desirous of selling the property, on the 22d of *March* 1806, served the defendant with a written notice to quit the premises on the 11th of *October* next (being *Old Michaelmas-day*.) from which time the taking had originally commenced. The defendant continued notwithstanding in possession, and this ejectment was brought in *Easter* term 1807. Two letters were given in evidence; one from the defendant to the landlord's agent, dated 1st *June* 1807, wherein the defendant stated "my landlord has given me an order to quit the house this month, and has served me with a writ of ejectment. I have lived there many years, and am loth to leave the premises. I did not expect any such treatment from him; you having always promised me, that I should not be turned out unless the house was sold. I should be glad to continue until the premises are sold. He has threatened

to seize all my property. I should be glad to stay where I am, if you approve of it." The other letter was from the landlord's agent, in answer to the above, dated the 11th of June. "Mr. Symons, I have just received your letter respecting the quitting of the house at *Tritton*. You say, *I promised you should not be turned out, until the place was sold: I did so, and have been as good as my word*: for Mr. Boulton (the lessor) sold the place last February to a person at *Summerly*, for him to have possession at *Lady-day* last, which I find you have withheld: and you must know, that you are wrong in so doing. Had the purchaser not objected to your staying, I should not: but as it now stands, I expect you to quit when required," &c. There was also proved an agreement, dated in February 1807, for the sale of this estate from Mr. Boulton to the purchaser; to whom possession was to have been delivered in March following. The objection was taken at the trial, that the subsequent permission of the landlord, by his agent, for the tenant to continue in possession until a sale, was a waiver of the antecedent notice to quit, so far as to prevent the tenant from being considered as a trespasser by relation back to the 11th of October 1806, when the notice to quit expired; although he continued in possession afterwards at the will of the landlord, which might be determined at any time, but which was not in fact determined till *Lady-day* 1807, or at least not sooner than the February before, when the contract for sale was made. *Grose*, J. however thought, that the meaning of the agreement was, that the permission to remain in possession was only conditional until a sale; the landlord reserving to himself the power to act upon his notice to quit, if necessary, in case of a sale: and that a sale having been made, and the tenant having refused to quit the possession when demanded of him, the landlord had a right to act upon his original notice to quit: and therefore the plaintiff obtained a verdict; but leave was given to move the Court to set it aside and enter a nonsuit, if the direction were wrong. Accordingly a rule nisi was obtained in the last term for this purpose; against which

Wilson and *Storks* were to have shewn cause: but *Dampier* was called upon to support the rule; who contended that the tenant, having had an express licence from his landlord to continue on the premises until a sale, could not be treated as a trespasser during the intervening period, which he must be deemed to be, if the notice to quit were good; and therefore by necessary implication it must be taken to have been waived. For as a recovery in this ejectment would be conclusive evidence that the defendant was a trespasser on the 13th of October 1806, it is repugnant to the evidence, which goes to prove that he was then in by licence. The demise should have been laid after *Lady-day* 1807, or after the sale. The landlord could not have brought ejectment before a sale, and by the same rule he cannot lay his title to have accrued before the sale. If he had brought trespass, the tenant might have pleaded the licence up to the time of the sale. The tenant has been entrapped to expend his money and labour on the premises under the licence to occupy, and is now to be made a trespasser by relation during the same period: but the law will not construe the agreement so as to produce so unjust a consequence: but will consider it as creating a tenancy at will, which it was necessary to determine by notice, before the tenant could be proceeded against as a trespasser: as in *Goodtitle v. Herbert*, 4 Term Rep. 689.

LORD ELLENBOROUGH, C. J. I cannot construe the language of this correspondence on the part of the landlord, as constituting a new tenancy between him and the defendant after the time of the notice to quit, or as a waiver of that notice: nor was it a license for the purpose now insisted upon. The landlord was willing indeed to let the defendant remain on the premises till a sale, but he was anxious at the same time to retain, and did reserve to himself, all his rights under the notice to quit, with which he was armed, in order to enforce obedience to that notice if it should be necessary. He said, in answer to the tenant's application, that he would not turn him out until the place was

sold; that is in effect saying, that until the place were sold, he would suspend the exercise of his right under the notice to quit: but it could not have been intended to give the tenant such a licence as would vacate the notice, and be destructive of the right which the landlord was so anxious to retain. No man would grant an indulgence of this sort to his tenant, if this use were to be made of it, plainly contrary to the understanding of the person who granted it. Here the landlord has kept his promise, and did not turn out the tenant before he had sold the premises: but the tenant has broken his engagement by not delivering up the possession after the sale, and now ungratefully holds out against his landlord. It was for the tenant to choose whether he would continue to hold on and to expend his money and labour on the premises under such an insecure sort of agreement, but having chosen to run the risk, he must take the consequence.

GROSE, J. I considered this as an unfair attempt on the part of the tenant to take advantage of and convert that into a right which the landlord meant only as an indulgence to him: to permit him to stay on the premises until they were sold: but still to retain the right of compelling him to quit under the notice, if a purchaser offered. The notice was given and persisted in for the express purpose of enabling the landlord to sell the premises to more advantage, and that, if sold, he might not be disabled from giving possession at the time to the purchaser.

LE BLANC, J. If this were to be considered as a license to the tenant to continue in possession, to be sure he could not be treated as a trespasser until the licence was determined; but upon the construction of the letter, coupled with the situation in which the parties stood at the time, I think it is clear that the landlord neither intended to grant him a licence, nor to consider him at all as a tenant. Suppose the promise, not to turn the tenant out before the place was sold, had been made before the notice to quit; but the landlord had then informed him that he would not preclude himself if he thought it proper to give him a notice to quit; what objection could have been made to the notice, if it were afterwards given? Then how does it differ the case, that the promise, though made afterwards, was made subject to the notice to quit? The landlord insists all along upon his notice to quit, though he promised not to turn the tenant out before the sale.

BAYLEY, J. The fair meaning of the letter is, that the landlord would not bring ejectment to turn the tenant out of possession upon the notice to quit, unless the premises were sold; but that he did not mean to dispossess himself of the legal right to turn him out on the notice after the 11th of *October*. The only effect of the recovery in this ejectment upon any subsequent action for the mesne profits will be, that the day of the demise laid in the declaration in ejectment will be conclusive of the right of the landlord to the possession of the premises from the 11th of *October*: but the tenant will still be entitled to shew, if he can, that the land had been of no value to him during that time; and then the landlord would only recover nominal damages.

Rule discharged(1)(2).

(1) Vide post, 189. It has been held, that the acceptance of rent accruing after the expiration of a notice to quit is a waiver of that notice. *Goodright d. Charter v. Corduent*, 6 Term Rep. 219. But merely permitting the tenant to remain in possession after the expiration of notice is not a waiver. *Boggs v. Black in Error*, 1 Binn. 383.

(2) [See also, *Humphill v. Tevis*, 4 W. & S. 585.—W.]

Warneford v. Kendall.

10 East, 19. June 20, 1808.

The possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not a *possession* within the penalty of the game laws.

THE plaintiff declared in debt for the 5*l.* penalty given by stat. 5 Ann. c. 14, against the defendant for *exposing to sale* a hare, not being qualified in his own right to kill game, nor entitled thereto under any person so qualified; against the form of the statute. At the trial it was proved, that the plaintiff went out coursing, and killed a hare on *Shipston* manor, when the defendant, who was employed as a carpenter and woodman by Mr. *Earl* the lord of the manor, and had directions from him to detect poachers, came up and took the hare from the dog, and carried it away, notwithstanding the plaintiff claimed it, to Mr. *Earl's* steward according to his instructions. *Lawrence*, J. before whom the cause was tried, thought that this was not a case within the statute; but upon the authority of *Molton v. Cheeseley*, 1 Esp. N. P. Cas. 123, with which he was pressed by the plaintiff's counsel, he suffered a verdict to be taken for the plaintiff, with leave to the defendant to move to set aside the verdict and enter a nonsuit, if the plaintiff were not entitled to recover. And a rule *nisi* having been obtained for that purpose, upon the application of *Park* and *Littledale*;

J. Williams now shewed cause, and contended, that the penalty was incurred by the defendant, within the express words of the statute 9 Ann. c. 25. s. 2, which enacts that, "if any hare, &c. shall be found in the possession, &c. of any person whatsoever, not qualified in his own right to kill game, or being entitled thereto under some person so qualified, the same shall be taken to be an exposing to sale thereof within the true intent and meaning of the statute 5 Ann." For the defendant was not qualified in his own right, and the steward of the manor, who, at most, could have had but a delegated authority from his master, and could not transfer such authority to another. And as to the defendant's possession of the game being *bona fide*, and without any intention to offend against the game laws, that cannot vary the case: as was held in *Calcraft v. Gibbs*, 5 Term Rep. 19; where though the defendant had acted *bona fide* as gamekeeper under a deputation to one who claimed to be lord of the manor, yet the claimant's title failing, the defendant was deemed liable to the penalty. So the possession of naval stores, however innocently, cannot be justified except in one or other of the ways protected by the act(a).

Lord ELLENBOROUGH, C. J. The question is, Whether the *possession* of the defendant were such as to constitute an offence and subject him to the penalty under the statute? He did not claim the hare as his property, nor acquire the possession of it for himself, but for his master, on whose manor it was taken: and if this be an offence no case can be stated in which an unqualified person can innocently come in contact with game. It may as well be said, that if a qualified man returning home with a bag of game were to fall from his horse, another could not lawfully take up the bag in order to assist the owner: or that if a person seized an offender who had naval stores unlawfully in his possession, and took them away in order to bring them before a magistrate, that would be an unlawful possession against the acts of parliament made for pro.

(a) 9 & 10 W. 3. c. 41. and vide stat. 39 and 40 G. 3. c. 89, which recites the intervening statutes: but see the case before *Foster*, J. in the Appendix to his Treatise on the Crown Law, 439, edit. of 1792, and 2 East's P. C. 765.

tecting the king's stores. The case of *Molton v. Cheeseley* must have been imperfectly stated (a).

GROSE, LE BLANC, and BAYLEY, Justices, assented; and the former observed, that the possession of the game by the defendant was rather for the purpose of protecting the game, than in breach of the laws for preserving it.

Rule absolute.

Hartley v. Rice.

10 East, 22. June 21, 1808.

A wagering contract for 50 guineas, that the plaintiff would not marry within six years, is *prima facie* in restraint of marriage, and therefore void; no circumstances appearing to shew that such restraint was prudent and proper in the particular instance.

THE plaintiff declared in assumpsit upon a wager made on the 25th of November 1799, whereby he betted with the defendant 50 guineas that he the plaintiff should not be married in six years: stating that in consideration that the plaintiff promised to pay the defendant 50 guineas in case he the plaintiff, should be married within that time, the defendant promised to pay the plaintiff the like sum if the plaintiff should not be married within that time. And then the plaintiff averred, that from the time of making the promise he has not been nor is yet married, but during all the time has remained and still is unmarried; whereby the defendant at the expiration of six years from the making of the promise became liable to pay to him the said sum, &c. To this the defendant demurred specially, on the ground that the contract declared on was illegal and void; the same having been entered into in restraint of marriage, and tending to prevent the plaintiff from marrying during the six years, &c.

Burroughs, in support of the demurrer, argued that a party binding himself not to marry on pain of paying a sum of money was a contract in restraint of marriage, and therefore void by the express determination in *Lowe v. Peers* (b). That indeed was a covenant not to marry any body else besides the plaintiff; which being indefinite might extend to the duration of the defendant's life: but the length of time in which the restraint is to operate, or the amount of the penalty, cannot make any difference in principle, any more than the form of the contract in that case being by deed, and in this by parol. *Baker v. White*, 2 Vern. 215, was also the case of a bond set aside, on the ground of its being in general restraint of marriage, as Lord *Hardwicke* declared in *Woodhouse v. Shepley*, 2 Atk. 540.

Marryat, contra, denied that this was a contract in restraint of marriage; *i. e.* for that purpose; though collaterally it might have that operation on the mind of the party; but such a possibility would not vitiate the contract. Supposing however, that it was a contract in partial restraint of marriage, he endeavoured to distinguish this from the cases cited, by saying that they went upon the restraint of marriage being general, and such as would enure during the lives of the parties: which was unreasonable in itself: but there was nothing unreasonable in a party restricting himself from marrying for six

(a) The fact there proved was, that a pheasant had been killed by accident by the defendant's dog; and the defendant had afterwards carried it away. Two penalties were sought to be recovered, one for having the pheasant in his possession not being qualified, and the other for keeping a dog to kill game. Mr. Justice Buller is said to have ruled that the plaintiff could go for one penalty only, "for that both offences being by the same act, the plaintiff could recover but one penalty under the same statute." The wording being equivocal, it was considered at first as if by the word act was to be understood statute; which it was agreed on all hands could not have been ruled by the learned judge; who probably said, that two penalties could not be recovered under this statute for the same act done by the defendant.

(b) 4 Barr. 2225. Vide S. C. in the Exchequer. Wilmot's Rep. 364.

years: circumstances might render it prudent and proper to impose such a temporary qualified restraint; the party might have been a minor: and nothing appeared here to shew the contrary.

Burrough replied, that in the absence of circumstances which shewed expressly that this was a prudent and proper restraint of marriage in the particular instance, the case fell within the general rule against all contracts in restraint of marriage.

LORD ELLENBOROUGH, C. J. On the face of the contract, its immediate tendency is, as far as it goes, to discourage marriage; and we have no scales to weigh the degree of effect it would have on the human mind. It is said, however, that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to shew that the restraint was reasonable: and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract. Wagers in general are seldom indifferent in their tendency, and this certainly is not so.

GROSE, J. Every contract in restraint of marriage is illegal, as was said by Lord *Hardwicke*. But this is endeavoured to be distinguished from former cases, as not being a total and indefinite restraint of marriage: that however must depend upon the duration of the party's life. If good for six years, why not for a longer period?

LE BLANC, J. This case is presented to us stripped of all particular circumstances, and therefore must be determined by the general rule of law. Now it is impossible to say that such a contract might not have an effect on the mind of the party to deter him from marrying during the six years: but a contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law; and nothing is stated here to shew it to be otherwise in the particular instance.

BAYLEY, J. This wager is calculated to operate against marriage, and no prudential reasons are shewn to have conduced to it in this instance; therefore it falls within the general rule, that being a contract in restraint of marriage generally, it is void(1).

Judgment for the Defendant.

The King v. The inhabitants of St. James in Bury St. Edmunds.

10 East, 25. June 22, 1808.

A labourer employed by his master to drive his cart into a parish with one load, and to return with another, and who broke his leg there by accident, which detained him for some time in such parish, by which he was relieved, is to be considered as *casual poor*, and as such is not removeable either under the stat. 13 and 14 Car. 2. c. 12. or the stat. 35 Geo. 3. c. 101, as not coming there to *settle or inhabit*; and consequently, the expences of his relief cannot be directed to be paid during the suspension of the order of removal under the latter statute.

TWO Justices, by an order in the usual form, reciting the complaint of the churchwardens, &c. of the poor of the parish of *St. James*, &c. that *Samuel Offord* did lately *come to inhabit* in the said parish, not having gained a legal settlement there, and that he was then actually chargeable to the parish, removed the said *S. Offord* from *St. James in Bury* to *Leworth*, both in *Suffolk*; which order was quashed, on appeal to the Sessions, subject to the opinion of this Court on a case, stating:

(1) As to what wagers are recoverable, and what are not, see note (1) to *Henkin v. Guerns*, 12 East 247.

That the pauper *Offord* being settled in *Ixworth* was employed, on the 23d of December 1807, as a day-labourer, by *R. Heffer* of *Ixworth*, to drive a load of hay to *St. James's* in the town of *Bury*, and to return with a load of muck. In loading the muck he fell and broke his leg. On the 24th December, two magistrates took the pauper's examination, made out the order of removal, and (the pauper being unable to be moved) suspended the execution by an indorsement on the back of the order. The pauper was attended by a surgeon by the order of the parish officers of *St. James*, and the expence of 16l. 13s. was incurred for his cure and maintenance. On the 1st of April, 1808, the pauper being able to move, the magistrates took off the suspension, and made the order for payment of the 16l. 13s. for the expences, by indorsing the same on the order of removal: and on the same day the order was executed, and the pauper conveyed to *Ixworth*.

The *Attorney-General* and *Storks*, in support of the order of Sessions, objected to the original order of removal and the order for payment of costs during the suspension of it, upon the ground that casual poor were not removeable before the stat. 35 G. 3. c. 101., and that act did not enable the magistrates to remove any persons who were not removeable before, but was meant to prevent persons who were removeable from being removed during illness or other infirmity which rendered it dangerous to them. The stat. 13 & 14 Car. 2 c. 12, which first gave the power of removal, is confined to persons coming to settle in a parish in any tenement under the yearly value of 10l.: and therefore where an order of removal only stated that the pauper had endeavoured to intrude into the parish, &c., it was held, *Rez v. Graffham*, 2 Const. 635. pl. 660. ill. The stat. 35 Geo. 3. c. 101. which enables the magistrates to suspend orders of removal, uses the words *inhabiting* or *sojourning* in the place from whence the pauper is to be removed. But neither could this pauper, in any fair sense of the words, be said to have come to settle in the parish of *St. James* in *Bury*, nor to have been *inhabiting* or *sojourning* there at the time of the order of removal made. The law throws the obligation of providing for casual poor on the parish in which they happen to be when the necessity arises. This is every day's experience. And in *Simmons v. Wilmot and Others*, 2 Esp. N. P. Cas. 91, Lord *Eldon*, C. J. of *C. B.* held, that where a person had relieved one who came under that description, he had a right to recover the expences from the parish officers. [Lord *Ellenborough* asked if there had been any subsequent recognition of the point said to have been ruled in that case: but no answer was given.] The general point was decided in *Newby v. Wiltshire*, Cald. 527, in this court, where it was held that the master of the pauper, who broke his leg as he was driving his master's waggon, was not liable to the surgeon for his cure; but that the parish were bound in the first instance to have taken care of him. So in *Watson v. Turner*, Exch. T. 7 G. 3. Bull. N. P. 129, 147, a subsequent promise made by a parish officer to pay the expences of a pauper's cure out of the parish was held binding as a consideration founded upon a moral obligation on the parish to provide for their poor(a).

Frere, contra, denied that there was any distinction between casual and other poor, in respect to their removal. Before the stat. 35 G. 3, it was always considered that coming to settle upon a tenement under 10l. a year, and being likely to become chargeable, were convertible terms; and the only difference that statute has made in this respect is to prevent persons who before were liable to be removed, as likely to become chargeable, from being removed till they are actually chargeable. The word *sojourning* used in that statute bespeaks only a temporary stay in a place, as contradistinguished from *inhabiting*, which implies a regular dwelling there. At the time when the order

(a) But the law will not raise an implied promise in parish officers to repay money laid out for one of their paupers taken ill in another parish. *Atkins v. Banwell*, 2 East, 505.

was made the pauper had not only been sojourning in the parish for a day, but was likely to continue there for some time. The objection would have applied as well to a removal under the stat. 13 & 14 Car. 2. as under the stat. 35 G. 3. ; and therefore the argument proves too much ; for the former statute has been long extended to cases not within the precise words of it ; and there have been numberless instances in practice of the removal of casual poor. Admitting that the parish is bound in the first instance to relieve casual poor, one of the objects of the stat. 35 G. 3. was to point out a course by which, without endangering the safety of sick or infirm paupers, the parish which relieved them might get reimbursed. And such a construction will best further the object of that act : for the remedy will be more promptly and efficaciously administered to casual poor from the consideration that the expence will be reimbursed to the parish. To determine now for the first time, that casual poor are not liable to be removed, will be attended with great inconvenience and encourage litigation. It will be made a question in a variety of cases with what view the pauper came into the parish from whence he is sought to be removed. The *animus morandi*, and the *animus revertendi* must also be discussed. The distinction of casual from other poor is only a popular one, and not to be found in any of the statutes relating to the poor. Every person relieved in a parish to which he does not belong is casual poor. The present question was raised in *Rex v. Keynaston*, 1 East, 118, but the case was decided upon another ground.

LORD ELLENBOROUGH, C. J. The case has been very fully gone into, and if the Court thought that any further light could be thrown upon it, they would have been desirous of receiving it. But no doubt can be raised on the question. No person is removeable from the parish where he is but by positive statute. In order therefore to see what that power is, we must trace it to the statute itself which confers it, the 13 & 14 Car. 2. c. 12, and that, after reciting that poor people endeavour to settle themselves in those parishes where there is the best stock, &c. : and when they have consumed it, then to another parish, &c. says, that it shall be lawful, on complaint of the parish officers, within 40 days after any such person *coming so to settle as aforesaid in any tenement under the yearly value of 10l.* for any two justices of the peace of the division where any person likely to be chargeable to the parish shall *come to inhabit*, by their warrant to remove him to the place of his last legal settlement. The expression of *coming to settle* denotes that the party comes *animo morandi* or *manendi* : it may be for a temporary purpose, but still it must be understood that he comes to settle there. But how can it be said, that the pauper went into this parish *animo morandi* at all ? He went into the town with a cart load of hay, which he was to dispose of, and return with a load of muck : how then can it be said, that he went there to settle ? Then if he were not removeable within the terms of the stat. 13 & 14 Car. 2., can we find any enlargement of the power of removal ? The stat. 35 Geo. 3., has the words *inhabiting* or *sojourning* : but it would be an extravagant construction of either of those terms to say, that it meant to include such a case as this. Then if the order be not warranted by either of these statutes, there is no authority for it, and the Sessions have done right to quash it.

GROSE, J. It is impossible to say, that the pauper became removeable by the stat. 35 G. 3., which was passed for the purpose of preventing poor persons from being removed till they were actually chargeable, who were before removeable under the stat 13 & 14 Car. 2. from the parish into which they had come to settle in a tenement under the yearly value of 10l., upon being likely to become chargeable. A man coming into a town with a cart, for an hour, to dispose of his load, cannot be said to have come there to *settle* : but having met with an accident there, which detained him, he comes within the description of casual poor, and as such was neither within the stat. 35 G. 3., nor that of the 13 & 14 Car. 2., and therefore the original order was improperly made.

LE BLANC, J. Whether ultimately it might be better either for the poor or for parishes, to consider persons of the description of this pauper as removable, I cannot say: I should hope that it would not make any difference in the treatment which poor persons in their necessities should experience: but we can only look to the authority which the magistrates had to remove the pauper. Their power, if any, must be derived either from the stat. 13 and 14 Car. 2, or the stat. 35 G. 3. It has been properly admitted, that the latter of these did not enlarge the power of removing poor persons, but was meant to provide that persons, who by law were before removable, if likely to become chargeable, should not be removed till actually so; and to make provision for suspending the order of removal when made in case of sickness or infirmity, and that the expences incurred in the care and maintenance of the persons, between the order to remove and the actual removal of them, should be defrayed by the parish to which they should be found to belong. We must then look to the stat. 13 and 14 Car. 2. Consistently with that statute which enables the order of removal to be made on complaint of the parish officers of persons coming to settle and inhabit in the parish, the form of the order states the complaint of the parish officers of *St. James's*, that the pauper came to inhabit in their parish; (and without such complaint the justices would have no jurisdiction). The question then is, Whether this pauper came to inhabit or settle in the parish? the case shews that he did not; for it states the particular object of his coming there to be to drive a load of hay and return with a load of muck: therefore under the statute of Car. 2. he could not lawfully be the object of complaint of the parish officers; and if not, the magistrates could have no power to remove him. This question, though glanced at, did not arise in *The King v. Kynaston*.

BAYLEY, J. The stat. 35 Geo. 3, was clearly intended to restrain the power of removal, and not to make persons removable who were not so before. Then the stat. 13 & 14 Car. 2, only gives the magistrates power to remove persons who come to settle and inhabit in a parish. Before that statute a settlement was gained by mere inhabitancy, and the statute was passed to prevent settlements being gained by inhabitancy. Now it is clear, that this pauper did not come to inhabit in the parish from whence he was removed. And as down to the period of the stat. 35 Geo. 3, it never was considered that a person, coming into a parish for such a purpose as this pauper did, came there to inhabit, or was removable; therefore, since the statute, which was passed to restrict the power of removal, he cannot be considered as a person removable. Order of Sessions confirmed.

Guard v. Hodge.

10 East, 32. June 22, 1809.

The venue may be changed in an action for criminal conversation on the usual affidavit that the whole cause of action, if any, arose in the county to which it is changed: for the whole cause of action is the trespass on the plaintiff's wife; and the venue can only be brought back by the plaintiff's undertaking to give material evidence in the original county.

THE venue was changed from *Middlesex* to *Devon*, in an action for criminal conversation with the plaintiff's wife, upon the usual affidavit that the whole cause of action, if any, arose in *Devon*, and not elsewhere out of that county. On which a rule nisi was obtained for discharging the former rule for changing the venue, and to bring the cause back into *Middlesex*, upon an affidavit that the marriage of the plaintiff with his wife was had in *Ireland*.

Dampier, in shewing cause against the last rule, said, that it was to be collected from the affidavit that *Devon* was the only place where the parties had met. That the question came to this, Whether the venue could ever be chang-

ed in this kind of action; which depended on whether the *corpus delicti*, or cause of action, were the criminal intercourse, or the injured sense of feeling which the husband carried about with him wherever he went? and it seemed the former. That the action in its form must be taken to be an action on the case, and not of trespass; otherwise the statute of limitations would run on it in four years, instead of six, as it had been determined to do.

The Attorney-General and Harris, in support of the rule, urged as an objection to changing the venue in such an action, that the defendant could not make the usual affidavit, without in some degree admitting the cause of action, and as the marriage of the plaintiff was had in *Ireland*, he could not bring the venue back again to *Middlesex* by giving the usual undertaking to give material evidence there. The gist of the action is the *per quod consortium amisit*, and therefore the plaintiff is damaged in every county where he is after the loss sustained. There is no instance of changing a venue in an action far debauching the plaintiff's daughter *per quod servitium amisit*. And in *Cailland v. Champion*, 7 Term Rep. 205, where the venue had been improperly changed, the Court ordered it to be brought back again.

LORD ELLENBOROUGH, C. J. The rule for changing the venue having been made on the usual affidavit, that the whole cause of action arose in the county of *Devon*, and not elsewhere, makes it necessary to consider what is the whole cause of action in this case. Now, that is the trespass committed on the wife; and the proof of the marriage of the plaintiff, though necessary to entitle him to recover for the injury complained of, is no part of the cause of action. As in *Clark and Another, Assignees, &c. v. Reed*, 1 New Rep. 310, where upon a rule for changing the venue from *London* to *Essex*, in an action brought by the assignees of a bankrupt against the defendant for money had and received; it having been objected that the commission was issued at *Westminster*, and the assignees were chosen at *Guildhall*; and that as it thereby appeared that the whole cause of action did not arise in *Essex*, therefore the plaintiff was entitled to retain his action in *London*: the Chief Justice said, that if the cause of action arose in two different counties the defendant had no right to change the venue; but that the matters stated were no part of the cause of action, which must have arisen before the bankruptcy; though they were material evidence to be given in support of it. Therefore, that the plaintiff must undertake to give material evidence in *London*, in order to draw back the venue. So here, though the marriage be a material inducement to the right of the plaintiff to maintain the action in respect to the trespass on his wife; yet it is no part of the cause of action; and consequently, the venue can only be brought back by the plaintiff's undertaking to give material evidence in *Middlesex*(1).

Per Curiam,

Rule discharged.

(1) In transitory actions, if the cause of action arises in the county where the venue is laid, and the plaintiff has material witnesses residing there, he may retain the venue, although the defendant has material witnesses residing in another county. *Stoutenberg & al. v. Legg & al.* 2 Johns. 481. *Franklin & al. v. Underhill*, 2 Johns. 874. *Manning v. Downing*, 2 Johns. 453. But the plaintiff will not be permitted to retain the venue, upon a stipulation merely to give material evidence in the county where it is laid, if the defendant satisfies the Court that he has material witnesses in a different county. *Manning v. Downing*, *ubi sup.* For other American cases relative to changing the venue, see *Bentley v. Weaver*, 1 Johns. Ca. 240. *Wheaton v. Slosson*, 2 Johns. 111. *Nicholson v. Lothrop*, 3 Johns. 189. *Spencer v. Hulbert*, 2 Caines. 874. *Low v. Hallitt*, *ibid.* *Du Boys v. Frank*, 3 Caines 95. *Delavan v. Baldwin*, 3 Caines 104. *Ross v. Loun*, 8 Johns. 354. See also *Zobieskie v. Bauder*, 1 Caines 487. *New Windsor Turnpike Company v. Wilson*, 3 Caines 127. *Darnedatt v. Wolfe*, 4 Hen. & Munf. 246. *Executors of Lynch v. Horry*, 1 Bay 223. *Corporation of New-York v. Dawson*, 2 Johns. Ca. 335.

The Trent Navigation Company v. Harley.

10 East, 84. June 23, 1808.

The laches of obligees in a bond, conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees,) in not properly examining his accounts for 8 or 9 years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel at law in an action against the sureties.

DEBT on bond given in 1799 for 500*l.*; the condition of which, reciting that the company's committee had appointed *James Ella*, collector of their tolls, and that the defendant and one *Barnsdale* had agreed to give their bond as sureties for *Ella's* faithful discharge of his duty, was that if *Ella* should, as long as he continued collector, from time to time perform the orders of the committee, and render to them or their treasurer, &c. true accounts in writing of all monies which he should receive and pay on account of the navigation, &c. and also if he should from time to time truly pay to the treasurer, when required, all sums of money which should come to his hands as such collector and receiver without fraud or delay, and in all things faithfully execute the said office of collector, &c. then the bond to be void. The declaration then set out a breach of the condition, that *Ella* did not pay to the treasurer, when required, all sums of money which came to his hands as such collector, &c. to wit, 600*l.* between the 6th of *August* 1799 and 1st of *November* 1807: of which the defendant afterwards had notice, &c.

The defendant pleaded, 1st, *non est factum*. 2dly, That *Ella* did from time to time pay to the treasurer, when required, all the sums which came to his hands as collector, &c. 3dly, That before *Ella* refused or was required to pay to the treasurer the said supposed sum come to his hands as collector, to wit, on 6th *August* 1801, *Ella* rendered accounts in writing to the committee, which purported to be true accounts in writing of all sums by him before received and expended, as collector, &c. which accounts were allowed, approved of, and passed by the said committee; and *Ella* in due manner when required paid to the treasurer the sums, which, upon the balance of the same accounts, appeared to be in his hands: and the committee and the plaintiffs, when they so allowed, approved of, and passed the same accounts, might, without their wilful neglect or default, have discovered any sums received by *Ella* as collector, &c. not included, and which ought to have been included therein, and any false or fraudulent entry, calculation, balance or other error, or deceit in the same accounts, &c.: yet the committee and the plaintiffs neglected so to do, and neglected to require *Ella* to pay any other sum than the balance in the accounts so delivered, &c. and also neglected to give due notice to the defendant of any refusal or default of *Ella* to pay any sum for six months after the passing and allowing the same accounts: by reason of which premises and of the laches of the plaintiffs in that behalf, and inasmuch as the defendant, without his default, was altogether ignorant of the premises, the defendant became wholly discharged from all liability to the plaintiffs on the bond, by reason of *Ella's* refusal to pay to the treasurer the said sum by him received as aforesaid. The 4th plea stated, that when the accounts were so rendered to the committee by *Ella*, and allowed, approved, and passed by them, (as mentioned in the last count), he was in due manner required and did in due manner pay to the treasurer the respective balances appearing to be due on such accounts; and that the committee and the plaintiffs, at the time they so allowed, approved, and passed the accounts, had notice that *Ella* had received certain sums, as collector, &c. not included, and which ought to have been included, in those accounts, being the sums mentioned in the declaration,

and also then knew of false and fraudulent entries, balances, and other errors, &c. in such accounts: yet the committee and the plaintiffs for a long time, to wit, six years after the passing of those accounts, neglected to require *Ella* to pay the sums so received by him, or to pay any other sum than the balances appearing on the accounts so rendered, &c. and during all that time neglected to give the defendant notice of any default or refusal of *Ella* to pay or account, &c.; and fraudulently concealed from the defendant that *Ella* had concealed the same: and that he had made the said false and fraudulent entries, balances, and errors, &c. by reason of which premises, and by the laches of the plaintiffs, and inasmuch as the defendant, without his default was ignorant of the premises, he became wholly discharged from all liability, &c. The 5th plea stated more generally, that the plaintiffs might, without their wilful neglect and default, have detected any sums received by *Ella* as collector, which ought to have been paid or accounted for by him to the plaintiffs, or any false entry, balance, error, &c. in the accounts so rendered by him: yet they neglected so to do, and for six years after the respective times of receiving the said supposed sums by *Ella*, they neglected to require him to pay them, and also neglected to give notice to the defendant of his default, &c. and the defendant, without his default, was ignorant of the premises and of the laches of the plaintiffs in that behalf, and thereby became discharged, &c. The 6th plea stated, that after *Ella* had received the sums in the declaration mentioned and not paid over, &c. the plaintiffs had notice of the same, and also of divers false entries, &c. and balances in his accounts, &c.; yet they neglected for the time and in the manner in the 5th plea mentioned, &c. Issues were taken on all these pleas.

At the trial before *Wood, B.* at *Leicester*, *Ella* the collector proved that, having received considerable sums for tonnages, he was, in *July 1807*, called upon by the treasurer to know how the account stood; and made it out: by which a balance appeared to be due to the company of above 1000*l.*: which he told the treasurer that he could not pay, but that his sureties must. The defendant, having been informed by *Ella* of this balance against him, required time to look into the account, and was to endeavour to settle it. *Ella* also proved, that he had debited himself with the amount of the tonnages when due, whether he received them or not; and that many of them he did not receive; but was in the habit of giving credit for them to different persons with the knowledge and consent of the treasurer. That he attended the meeting of the committee, who audited their books once a year. And *Ella* produced in court the book by which he accounted to the treasurer for the tolls received, and which was at all times ready for his inspection; and which contained the initials of the treasurer and his clerk denoting receipts of money from *Ella*. Neither the treasurer, nor the company, ever complained of any deficiency in *Ella's* accounts till *July 1807*, when he communicated it to his sureties; though the treasurer might every year have ascertained the balance due to the company: and there was no difficulty in detecting the errors when the accounts were settled. On the part of the defendant, it was contended, that the action did not lie in the name of the company, they having been paid all the arrears for which the action was brought by their treasurer, who, by this action, brought in the name of the company, was endeavouring to recoup himself in damages against *Ella's* surety. But the learned Judge said, he could not notice that defence upon this record. It was next contended, that the sureties were discharged by the treasurer's not having given notice to them of *Ella's* being so much in arrear in his accounts, and by suffering him to run so much in arrear. But that was also ruled to be no defence at law, and only available, if at all, in equity; where the general principle was, that if an obligee enlarged the time of payment to a principal, without the consent of the sureties, the latter were discharged. But whether that had ever been extended so far as to hold that sureties were discharged by an obligee's neg-

lecting to call upon the principal, so soon as he might; or by not giving notice to the sureties that their principal had not paid, might be doubted. But that in this case, it appeared that the sureties had notice immediately after the deficiency was discovered; and that till that time the treasurer had a good opinion of, and did not suspect, *Ella*. There was no proof of *Ella's* having ever rendered any account to the committee: and the defendant's counsel declined going to the jury either upon the fact of the request to account, or the quantum of the demand: but, reserving the questions of law, or any remedy in equity, it was agreed, that only one sum of 500*L*. should be taken in execution upon this and another action against the other surety.

Vaughan, Serjt. having before obtained a rule *nisi* for a new trial, was now called upon to support his objection to the verdict, and to point out to which of the pleas he meant to apply the evidence. 1st, He contended that the evidence amounted to proof of payment to the treasurer, under the 2d plea, of all the sums actually received by the collector, *Ella*; though he had also debited himself with sums which he had not actually received, but which he had given credit for to different persons, with the knowledge and consent of the treasurer, which was within the scope of his duty. [But the *Court* said, that there was no evidence of payment in fact to the company of the tolls received.] 2dly, He contended that the accounts having been annually audited and approved by the committee, in which those sums were set down as received, which in fact had not been received; and it appearing that the errors which existed were such as might easily have been detected upon the view of the accounts, when they were settled; and the treasurer might every year have ascertained the balance due to the company; either it must be taken that by omitting to examine the accounts properly and to ascertain the balance, the committee discharged the collector, and gave credit to the treasurer; which would also amount to payment under the 2d plea: or, 3dly, The committee were guilty of such gross negligence and laches, in not requiring the principal to account according to the condition of the bond from time to time, as will discharge the sureties from their obligation. For the sureties rely upon the obligees using due diligence against the principal obligor, and their omitting to do so for 8 or 9 years lulls the sureties into a false security, and prevents them from using due diligence against their principal for their own protection. And he referred to *Rees v. Berrington*, 2 Ves. jun. 544, where Lord *Loughborough*, C. held, that an obligee's giving time to the principal, without notice to the surety discharged the latter.

Balguy and *Clarke*, contra, were stopped by the Court.

Lord *ELLENBOROUGH*, C. J. The only question is, Whether the laches of the obligees in not calling upon the principal so soon as they might have done, if the accounts had been properly examined from time to time, be an estoppel at law against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity. None of the pleas appear to have been proved in fact(1)(2).

Per Curiam,

Rule discharged.

(1) *Barnard v. Norton*, Kirb. 192. *Deming v. Norton*, Kirb. 397. *Graham v. Goudy*, Addis, 55.

(2) [Mere indulgence to the principal will not absolve the security, without an omission to pursue the principal after notice to proceed. *Johnston v. Thompson*, 4 W. 446. The rule is well settled, that mere forbearance, however prejudicial to the surety, will not discharge him. It is the business of the surety to quicken the creditor when the occasion requires it, in the way known to the law, per *Gibson*, C. J. *U. S. v. Simpson*, 8 P. R. 439. See also *U. S. v. Howell*, 4 W. C. C. R. 620. *Hunt v. Bridgman*, 2 Pick. 581. *Bellows v. Lovell*, 4 do. 163. 5 do. 307.—W.]

The King v. The Inhabitants of Hellingley.

10 East, 41. June 25, 1808.

A tenement found to be of the value of 4s. a week, and to be dismissable at all times of the year, if let *by the week* : but not to be of the value of 10*l.* a year, to be let *by the year* ; cannot confer a settlement on the occupier by residence thereon for 40 days.

TWO justices by an order removed the wife and four children of *James Patterson* from *Hellingley* to *Brighthelmstone*, both in the county of *Sussex* : the Sessions quashed the order, subject to the opinion of this Court on the following case. *James Patterson*, the husband and father of the paupers, at the time of the taking and occupying the tenement hereinafter mentioned, was a private soldier in the *Sussex* militia, quartered at *Brighton* with his regiment, which then lay in the barracks there. He had permission from his officers to sleep out of the barracks for the purpose of being with his family : and hired a house at *Brighton* by the week paying four shillings a week for the same, which house he so continued to occupy and sleep in with his wife and family for three months. The house so hired and occupied by him is at all times of the year of the value of four shillings a week, if taken by the week : but is not of the value of 10*l.* per annum to be taken by the year. The question reserved was, Whether *James Patterson* gained a settlement under the above circumstances ?

Courthope and *Sedgwick*, in support of the order of Sessions, contended, 1st, That the fact found in the case, that the tenement was not of the value of 10*l.* a year, concluded the question : for though the letting need not be by the year, yet the value of the tenement must be estimated *by the year* : because the act 13 and 14 Car. 2. c. 12. speaks of coming to *settle*, i. e. to *reside*, on a tenement under the *yearly value of 10*l.** 2dly, A soldier cannot gain a settlement during the time that he is on military duty in the parish. The stat. of Car. 2. was not made to facilitate but to restrain settlements, by enabling the magistrates to remove those who came to settle on tenements under 10*l.* a year who were likely to be chargeable : but a soldier could not have been removed at any rate, either before or after that act, and therefore could not gain a settlement by residence on a tenement of that value under the act, not being within the intention of it. And this is confirmed by the clause in the mutiny act, enabling every soldier to be examined as to his settlement ; which examination is conclusive ever afterwards, and he cannot be examined a second time ; which shews that the Legislature considered that a soldier could not gain a subsequent settlement.

D'Oyly and *Roe*, contra, argued that the meaning of *yearly value of 10*l.** in the statute, was a tenement which would produce to the owner 10*l.* in the course of a year : the *yearly value* being so called in contradistinction to the *gross value* of the tenement, to be sold. The act does not speak of the yearly value "under a yearly contract," as contended for ; and if such a letting as this be not sufficient, it must be argued that if a tenement in such a place as *Brighton* could not be let at all by the year, but could be let by the week, so as always to produce above 10*l.* within the year, yet it must be taken as worth nothing *by the year*. Here the value is found to be 4s. a week at *all* times of the year. The question might be different if that were otherwise. It may well happen that for one six months *A.* would be always willing to pay 5*l.* for a tenement, and *B.* 5*l.* for the other 6 months ; and yet it might not be worth 10*l.* to either of them ; because neither would want it for the whole year. But the true question is, How much it is worth to the immediate owner, who collects the rent from the actual occupiers ? and if he in fact receive 10*l.* a year from all the tenants at different times within the year, the yearly value of the tenement must be so much : although if he be a middle-man he may deduct a certain proportion of that for his trouble and profit before he makes

his payment over to the owner of the inheritance. *Value* and *rent* are different things, and the word used in the statute is *value*. In *Rex v. Framlingham*, Burr. S. C. 748, the landlord's paying the rates and taxes out of a reserved rent of 10*l.* a year did not prevent the gaining of a settlement. So in *Rex v. St. Mathew, Bethnal Green*, Ib. 574. If the value be of 10*l.* a year, though the rent be less, it is the same. In *Rex v. Whitechapel*, Hil. 26 G. 3, 2 Const. 154, there was no finding of what the room would have let for by the year, but only by the week. The true question, according to *Ashhurst J.* in *Rex v. Fil-loughley*, 1 Term Rep. 460, is whether the party have sufficient credit to be trusted with a tenement of 10*l.* a year value. 2dly, The reason why a soldier cannot gain a settlement by hiring and service, because he cannot contract for his personal service with the master, does not apply to a settlement of this kind for which it is only necessary that he stand in the relation of tenant to the premises for 40 days during his residence in the same parish. Officers stand in this respect in the same situation as common soldiers under the mutiny act. And however uncertain their residence may be prospectively, that cannot affect the relation of landlord and tenant, as it does that of master and servant. The residence of a tenant at will is prospectively as uncertain; and yet that is no objection to his gaining a settlement. The clause in the mutiny act relative to the examination of soldiers as to the place of their settlement is merely to facilitate the proof, without withdrawing the soldier again and again from his duty every time he changes his quarters, to examine him as to the same settlement. To make oath *as aforesaid* means to make oath of his settlement in *A.*, which he had before made oath of; but does not prohibit another examination as to a new settlement in *B.*

LORD ELLENBOROUGH, C. J. It is unnecessary to consider the second ground of argument, how far a soldier, as such, is capable of gaining a settlement by renting a tenement of 10*l.* a-year, the Court being clearly of opinion, upon the first ground, that no settlement was gained by the pauper in *Brighton*. The words of the statute enable the justices to remove any person who "shall come to settle in any tenement under the yearly value of 10*l.*" that is, upon a tenement the value of which is to be estimated by its annual value, to be let by the year, at the time of the party's coming to settle upon it. It need not in fact be let for a whole year: it may be let by the week, or the day; but those lettings are only media for ascertaining the yearly value, if nothing appear to the contrary: but when it is expressly found that the tenement was not of the value of 10*l.* a-year to be taken by the year, it is impossible by any reasoning to make the matter more clear. Suppose, however, that it might be let every week in the year at 4*s.* a-week, which would amount to 10*l.* 8*s.* and a fraction; I ask whether in fair estimation that would be of equal value with a tenement of the value of 10*l.* a-year to let by the year? Whether the difference of 8*s.* and a fraction to be made by fifty-two successive contracts would be an equivalent for so much additional trouble and inconvenience? nobody could hesitate to say that such a tenement was not of the value of 10*l.* to be let by the year. But the statute, speaking of *yearly* value, means the value of the tenement to be let *by the year*.

GROSE, J. agreed.

LE BLANC, J. When the statute speaks of the *yearly* value, what else can be understood by that expression but the value to be let *by the year*? It has been held indeed by construction of the statute, that a settlement may be gained by a taking of a tenement for less than a year, provided it is of an aliquot value, which would amount to 10*l.* a year. But in none of the cases where that has been decided did it appear that the estimated value depended on the mode of letting by the week or other shorter period than a year. But the letting at so much by the week or the month was merely taken as a criterion of the yearly value: and this is an answer to all those cases. Here,

however; it is stated that the value of 10*l.* within the year depended on the taking being for a shorter period than a year, and no person would have paid that *yearly* value for it. If this, then, were allowed to confer a settlement, the next thing contended for would be, that a field which nobody would take for 10*l.* a-year, if it could, be let out by the tenant for one night (which he might do to drovers of cattle on the road) at that rate would confer a settlement. I am not disposed to extend the words of the act further than the cases have already gone.

BAYLEY, J. This case is so clear, that I regret that the Sessions were prevailed upon to reserve it for our consideration. The question is, Whether the value of this tenement be 10*l.* a year? To ascertain that, the only fair criterion is, whether it would let at a single letting, without further trouble, for that sum. If it could be so let at a single letting, the landlord might reside elsewhere at a distance: but if it is to be let weekly, he must either reside upon the spot himself, and have so much additional trouble in letting it, or he must employ somebody else there, and pay him for his trouble: and in either case, part of the 10*l.* obtained within the year by weekly lettings would go either to compensate himself for his trouble, or in defraying the expence of his agent: besides, the risk of not being able to let it for three weeks in the course of the year, in which case the actual rent would be reduced under 10*l.* a-year. The statute then, speaking of the *yearly* value, and the question being, Whether, the tenement were worth 10*l.* a-year to be let at a single letting, without further trouble; and that being negatived by the case; it is clear that no settlement was gained by the pauper's occupation of it.

Order of Sessions confirmed.

Cunningham v. Cogan.

10 East, 47. June 25, 1808.

In the case of a defendant charged in execution, the *committitur* must be filed of the same term as the marshal's acknowledgment.

FINAL judgment was signed in last *Hilary* term, and in the same term the usual rule was taken out for the marshal to acknowledge the defendant in his custody: but the *committitur*, under which the defendant was charged in execution, was not filed till *Easter* term. And because the *committitur* was not filed in the same term as the judgment, a rule was obtained, upon the authority of *Fisher v. Stanhope*, 1 Term Rep. 446, calling on the plaintiff to shew cause why it should not be taken off the file, and the defendant be discharged out of the custody of the marshal.

Hullock, in shewing cause, observed, that in *Fisher v. Stanhope* the *committitur* was not filed till the third term; but that here it was filed in the next term after final judgment; which was in time, according to the practice, to charge the defendant in execution. That the rule for the marshal to acknowledge the defendant in his custody need not have been taken out till *Easter* term; but that would not hurt, as the *Committitur* was the material thing.

Comyn, contra, (in answer to a question from the Court, how the marshal's acknowledgment was material to the regularity of the *committitur*) answered, that formerly the prisoner was brought up in person, and committed by order of the Court to the custody of the marshal in court: but that now a rule is made out, and served on the marshal, to acknowledge that the defendant is in his custody, and the marshal's acknowledgment is made on that rule; and therefore it was necessary, for consistency sake, that the acknowledgment of the marshal should be of the same term as the *committitur*; and until such

acknowledgment, the marshal would not be liable for an escape. And therefore *Ashhurst*, J. delivered the opinion of the court in *Fisher v. Stanhope*, that the acknowledgment ought to be of the same term in which the defendant was charged in execution, and that the preceding acknowledgment given in that case two terms before was not sufficient. If the plaintiff did not mean to charge the defendant in execution till *Easter* term, he should have waived the former, and taken out a new rule in that term.

Lord ELLENBOROUGH, C. J. The *committitur* proceeds on the acknowledgment of the marshal in an antecedent term, and is therefore irregular, on the authority of the case cited.

Per Curiam,

Rule absolute(a).

Ryal v. Rich.

10 East, 47. June 25, 1808.

A landlord declared in debt, 1st, for the double value, 2dly, for use and occupation: the tenant pleaded *nil habet* to the 1st, and a tender of the single rent before action brought to the 2d count, and paid the money into court: which the plaintiff took out before trial, and still proceeded: and held that this was no cause of nonsuit, as upon the ground of such acceptance of the single rent being a waiver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury; and that the plaintiff's going on with the action after taking the single rent out of court was evidence to shew that he did not mean to waive his claim for the double value, but to take it *pro tanto*.

It seems, that though the single rent were paid into court on the second count, yet if the plaintiff had not accepted it, but had recovered on the first count, the defendant would have been entitled to have the money so paid in deducted out of the larger sum recovered.

THE plaintiff declared in debt, for that the defendant before and on the 25th of Dec. 1805, held a messuage and lands called *North Allson*, as tenant from year to year, of which the reversion was in the plaintiff; that on the 20th of Dec. 1804, the plaintiff gave the defendant notice in writing to quit the premises, and demanded the possession thereof on the 25th of Dec. 1805, when the interest of the defendant determined: nevertheless the defendant refused to deliver up possession according to the notice, and wilfully held over, &c. against the statute: and then the plaintiff averred the yearly value of the premises to be 80*l.*, and demanded 200*l.* as the double value, during the time the defendant so held over. There was a second general count for the use and occupation of a certain other dwelling-house and lands held by the defendant of the plaintiff by his sufferance and permission. The defendant pleaded as to 200*l.* demanded in the first count, and 112*l.* 10*s.* parcel of the 200*l.* demanded in the second count, *nil debet*: and as to 87*l.* 10*s.* residue of the 200*l.* in the second count, he pleaded that after it became due, and before the exhibiting of the plaintiff's bill, viz. on the 25th of March 1807, he tendered the same to the plaintiff, who refused to receive it: and in another plea, he stated the tender of 17*l.* 10*s.* on the different quarter days on which the same became due, (making in the whole 87*l.* 10*s.*) as rent for the premises mentioned in the second count, from the 25th of March 1806 to the 25th of March 1807, (the last quarter day before the commencement of the action); which the plaintiff refused to accept, and the defendant now brought the same into court. The plaintiff in his replication joined issue on the *nil debet*, and admitting the tender as pleaded, took the money out of court on the 24th of July 1807. The cause was tried at *Lancaster* in March 1808 when the plaintiff proved the tenancy by payment to him of the rent by the defendant, and the notice to quit as laid, and that the annual value was 70*l.*,

(a) *Vide* the forms of the rule on the marshal to acknowledge, &c. of the *committitur*-piece, and of the entry of the *committitur*, 3 Tidd's Practice, Appendix.

plaintiff, for which the rent had been tendered before the action, and paid into court, Serjeant *Marshall*, who tried the cause, thereupon nonsuited the plaintiff; being of opinion that as he had received the rent paid into court upon the second count, which appeared upon the evidence to be for the same premises, and for the same period, for which the double value was claimed, he had waived his title to the latter, and that the jury could not, in addition to the single rent so received, find a verdict for the double value.

Moore, in the last term obtained a rule *nisi* for setting aside the nonsuit, on the ground that the acceptance of the single rent upon the general count for use and occupation was no waiver on the record of the double value sought to be recovered by the first count for wilfully holding over. And whether it were a waiver in fact was a question for the jury to have decided.

East, and *Adam jun.*, now shewed cause, and contended that the double value for wilfully holding over premises, after notice to the tenant to quit, was given by the stat. 4 Geo. 2. c. 28. in the nature of a *penalty*; for it provides that "against the recovery of the said *penalty* there shall be no relief in equity." In such an action therefore the landlord disaffirms the tenancy of the defendant, and proceeds against him as a trespasser and wrong-doer: and on that ground the court in *Soulsby v. Neving*, 9 East, 310, held that there was no inconsistency in maintaining this action after a recovery of the same premises in ejectment; though they doubted whether after a recovery in ejectment an action would lie for double *rent* upon the stat. 11 Geo. 2. c. 19, in which the tenancy was recognised. Upon the same principle the acceptance of rent, *qua rent*, by a landlord, by which he recognizes the tenancy and lawful possession of the tenant for the period during which the rent accrued, is clearly inconsistent with the action for double value during the same period, in which action the defendant is treated as a trespasser and wrong-doer. Wherefore in *Cobb v. Stokes*, 8 East, 358, the Court held, that if the landlord took his verdict for the double value from the middle of a quarter when the possession was demanded, he could not recover the single rent, for the antecedent fraction of such quarter (the rent having been before reserved quarterly) upon the general count for use and occupation, as upon an implied tenancy, with reference to the former holding. Now here the plea of tender of *rent* (which could only be pleaded to the count for use and occupation; for it would have been no answer to the count for wilfully holding over after notice to quit, to which another answer would have been given at the trial, if the cause had proceeded) covered the whole period for which the double value was claimed in the first count; and the acceptance of the tender, which adopts the terms and character of it, must be taken to be an admission by the landlord that the defendant held the premises mentioned in the second count as tenant to him during the whole period for which the rent was claimed, and that he received the tender as of *rent* for the same premises. And then, when it was proved at the trial, that the defendant held no other premises of the plaintiff but those for which he had already received such rent under the general count for the very same period, this operated, not indeed as a legal estoppel upon the record to his recovery of the double value or penalty upon the first count but as a waiver of the penalty in fact, as a waiver of the notice to quit, and as a waiver of the demand of possession under the stat. 4 G. 2.; because these claims, founded only, as they are, upon the ground of a tortious possession, are inconsistent with the recognition of a lawful tenancy during the same period. And the tender having been made upon the count for use and occupation only, it was not competent to the plaintiff, when he took it out of court, to say that he meant to apply it to the first count for wilfully holding over (to which it could not apply), and that he only received it in part satisfaction of the penalty, and not as rent.

Lord ELLENBOROUGH, C. J. In this action the plaintiff claims first to recover a statutable compensation from the defendant, for holding over the possession of the premises after the expiration of a notice to quit and demand

of possession ; and, 2dly, to recover so much for use and occupation, upon the conventional stipulation of the parties. The first claim arises out of the compensation given by the stat. 4 Geo. 2., and the case stands thus : If the tender of the single rent had been accepted before the action brought, it would have been a question for the jury to have determined, whether it were not a waiver of the landlord's claim to the double value ? If it were accepted after the action brought, it became a question with what intent it was received ; whether in part satisfaction of the double value, or as a waiver of it. At any rate, it is no estoppel in law, but an estoppel, if at all, arising out of the acts and intents of the parties, which should have gone to the jury. There cannot indeed be a double satisfaction for the same thing ; but the question is in what sense the plaintiff received the money tendered and paid into court : whether as part of the larger sum which he claimed for the double value, or as the less sum claimed for use and occupation ? Now, nothing appears here to shew that he was estopped from taking it as part of the larger sum claimed by the first count : and the very fact of his going on with the suit, after taking the money out of court, shews that he did not mean to take it in satisfaction of the lesser sum. It was therefore no estoppel from proceeding for the double value.

LE BLANC, J.(a) It is sufficient to say, that this was not a ground of nonsuit. A tender was made of the single rent before the action was brought, which the plaintiff refused to receive, and brought his action, claiming in his first count the double value, and in his second so much for use and occupation. The defendant paid the money tendered into court on the second count. If then the plaintiff had not taken the money out of court, how would the case have stood ? If he had substantiated his first count, he would have recovered a verdict for the whole of the double value and got judgment, and taken out execution for it. And how the defendant would have got his money out of court again I do not know. Or the plaintiff might have taken the money paid into court in part satisfaction of the money recovered for the double value, and only taken out execution for the remainder. But here he took the money out before verdict, and afterwards went on to recover the double value, deducting that sum. This case then appears to me to fall in very closely with the doctrine in *Doe v. Batten*(b). There the landlord had received a quarter's rent, due after the expiration of a notice to quit, and after ejectment brought ; but still he proceeded with his ejectment : and the question, which was considered as proper to be submitted to the jury, was, whether this were a waiver on the part of the landlord of his right to proceed : and it was held not to be a waiver. So here the proof of the defendant having tendered the single rent and paid it into court, and the plaintiff having taken it out, but still proceeding in his action, was not a ground of nonsuit.

BAYLEY, J. The objection taken is against the law and justice of the case. The plaintiff in his first count claims the double value ; and in his second count the single value of the premises. The defendant pleads a tender as of the single value, and pays the money into court on the general count. The plaintiff says in effect, I am willing to receive the single value paid in as part of the double value which I claim ; but I will still go on for the remainder. There is no inconsistency in this. If then the plaintiff had recovered upon the first count, the defendant would have been entitled to have the single value paid in deducted out of the double value recovered, and no injustice would be done. And the plaintiff's going on with his action after taking the money out of court shews that he did not mean to accept it as a compensation for the double value, but only in part satisfaction of his demand(1).

Rule absolute.

(a) *Gross, J.* was absent.

(b) *Cowp.* 248. and vide *Doe v. Humphreys*, 2 East, 287.

(1) In an action on a policy of insurance the defendant paid the premium into court under

Hendy and Others v. Stephenson and Others.

10 East, 55. June 28, 1808.

A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the *locus in quo* under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proffered in court, of which the date and names of the parties are unknown.

TRESPASS for breaking and entering the close of the plaintiffs in the parish of *St. John the Evangelist, Westminster*, parcel of *Tothillfields, &c.* in the county of *Middlesex*, and pulling down a building there erected, &c. The defendants by their second plea justified the breaking and entering, &c.; for that the building was erected in *Tothillfields*, and that one *M. B. Wise* at the time, &c. was seised in fee of 10 acres of land, &c. contiguous to *Tothillfields*, and he and all those whose estate he had from time immemorial had right of common of pasture throughout *Tothillfields*; and because the building was wrongfully erected there, and incumbered the same, so that he could not enjoy his common of pasture there, without prostrating it, the defendants by his command, &c. broke and entered, &c. 3dly, They justified by a similar plea under *Jeremy Bentham*. 4thly, They pleaded, that the said building was erected in *Tothillfields*, and that *M. B. Wise* before, and at the time of the supposed trespass, was seised in fee of other ten acres of land, &c. contiguous to *Tothillfields*; and that long before the said time when, &c. by a deed made between the then owner of the part of *Tothillfields* whereon the building was erected, and in which, &c. (such owner being then and there seised in fee of such part, &c., and the then owner of the said last mentioned land, &c. whereof *M. B. Wise* was so seised (such last mentioned owner being then and there seised in fee of such last mentioned land, and whose estate therein the said *M. B. W.* at the said time when, &c. had: *but which deed is since lost or destroyed by accident and length of time, and therefore cannot be brought into court here, and the date thereof is, and the particular parties thereto are, for that reason, wholly unknown to the defendants*) the said then owner of *Tothillfields*, and in which, &c. being then and there well entitled so to do, did grant to the said then owners of the said last mentioned land, &c. whereof *M. B. Wise* was so seised as aforesaid, and the heirs and assigns of the said last mentioned owner for himself and themselves for the time being, common of pasture throughout the said part, &c. called *Tothillfields*, whereon the said building was so erected," &c. and because the building was wrongfully erected, and incumbered and abridged *M. B. Wise's* common of pasture, the defendants justified breaking and entering, &c. by his command, and prostrating such building, &c. And there was a similar plea of justification under *Jeremy Bentham*. The replication took issues on the 2d and 3d pleas, and demurred to the two last; stating for special causes, that no person is described in those pleas either as the grantors or grantees of the grants there mentioned; nor is any time specified when the supposed grants were made; nor are the necessary circumstances attending them specified with sufficient certainty: whereby the plaintiffs are prevented from taking any certain issue on such grants, or on the seisin of such respective grantors or grantees, and are disabled from applying any evidence to such loose and uncertain allegations, &c.

Dampier, in support of the demurrer, observed, that this plea was a new experiment, attempted to be derived from the doctrine in *Read v. Brookman*, 3 Term Rep. 151, but going much beyond it. It was there decided, for the

a rule, which was taken out by the plaintiff. It was held, that the act of receiving the money was not an affirmance of the plaintiff's right to the premium only so as to preclude him from proceeding for a total loss. *Sleight v. Rhinelanders & al.* 1 Johns. 192.

first time, that a profert of a non-existing grant might be dispensed with on a bare averment that it was lost and destroyed by time and accident. Before that determination, the excepted cases were the profert of a deed in another court, *Wymark's case*, 5 Rep. 74. b. 75. a, the possession of it by the opposite party, lb. and, what was more doubtful, the destruction of it by fire, *Dr. Leyfield's case*, 10 Rep. 92. b. 93. a., but neither the doctrine of that case, nor any just consequence to be derived from it, can warrant the pleading not only a non-existing grant, but a grant of unknown parties, and without a date. If this be allowed, there will be no more pleas of prescription. It will apply to rights of way as well as rights of common, and there will be no more occasion for pleas of a way of necessity: no question will hereafter arise as to unity of possession, or a release of the right. One who had such a grant would do well to burn it, as the loss of his deed would be of more advantage to him than the possession of it. If he gave the deed, he must in his plea state the time, set out the parties, and shew that they had estates to make and receive the grant, and deduce the title to himself; and the plaintiff may take issue upon any of these facts: or he may reply *non est factum*, fraud or duress, to the deed itself, if it be pleaded as existing, or though not existing, if pleaded with particularity, as in *Read v. Brookman*. So he might take issue on the seisin of the grantor or grantee, or on any part of the title. But how can that be done in the present case, where it is only stated that an unknown owner of the land at an indeterminate time past was seised, and granted to another unknown owner of other land, who was also seised. If the parties and times had been named, a subsequent release or regrant might have been replied. The time of the grant not being specified also puts the plaintiff to great disadvantage in evidence. For if, in reply to such a grant pleaded, he prove a denial, or obstruction, or any decisive circumstance at any particular time, it would be answered that the defendant's grant, not being tied down to any time, was subsequent to such fact, and therefore not inconsistent with it. But without an express authority for pleading a grant thus generally, it seems difficult to maintain on any legal principle, that a defendant who has invaded another's possession should be able to secure to himself, and deprive the plaintiff of so many advantages by this new invention. All that follows from the decision of *Read v. Brookman* is, that the party who pleads a lost grant need not produce the parchment; but he must still aver every thing material in the grant; as in *Campbell v. Wilson*, 3 East, 294. The former case only introduced the difficulty of detecting fraud, by withholding a view of the deed itself: but issue might still be taken on the material facts of it as there pleaded. It may be said, that as the parties, under whom the defendants justify, might have brought an action for the disturbance of their common, and have declared on their possession; by the same reason they ought, when sued, to be permitted to plead title on their possession: but there is this material distinction between the two cases, that possession itself is a *prima facie* title whereon to declare generally against a *prima facie* trespasser: but if a person will invade the possession of another, he ought to be prepared to state his title, when questioned for his apparent wrongful act: otherwise it will be applying the rule of pleading in possessory actions, which was permitted in favour of possession, to pleas defending the invasion of possession, and justifying it on the ground of title: and these are the more necessary to be pleaded strictly, inasmuch as they bind the right between the parties, which a declaration on the possession does not. If, however, the defendant's argument were of any weight, it would prove that they might merely have pleaded their possession of a right of common over the *locus in quo*, without more; and this would extend to all cases, whether of prescription or of grant.

Abbott, contra, said, that most of what had been urged against this plea, had been urged, but without effect, in *Read v. Brookman*. There indeed the names of the parties to the deed and the time were stated in the plea: but if

the instrument be lost, so that the party pleading cannot produce it, he may not be able in fact to state the names or the dates. And it would be a strange inconsistency in the law that a defendant should not be able to justify himself under the same title on which he might have brought his action on the case for interrupting him in the enjoyment of his right of common. For there it would have been sufficient for him as plaintiff, to have shewn an uninterrupted possession and enjoyment of it for a long period back, and a grant would have been presumed. Finding, however, the opinion of the Court decidedly against him, he declined arguing the case further.

LORD ELLENBOROUGH, C. J. The distinction between declaring in a possessory action, and justifying upon title in a plea to an action of trespass, has been stated and allowed: but this luxuriant shoot from the stock of *Read v. Brookman* cannot be supported. If this were permitted to pass, we should next have an issue upon whether the plaintiff or the defendant had the more mere right of possession. I think therefore that we are warranted in relieving the defendant's counsel from the useless labour of arguing in support of the plea. The case of *Read v. Brookman* went a step further than the cases had gone before: and without saying that the step should be retraced, we ought not to go a step further, but stop there; otherwise, it might really be said that this plea stated too much, and that it would be sufficient for the defendant to plead merely that he was possessed of the *locus in quo* by grant. If the deed itself cannot be produced, it may be equitable to permit the substance of it to be substituted in place of it in pleading *non in tabulis est jus*: but still it must be substantiated in the material terms of it, so that the Court may see what the grant really was. If not, the inconveniences suggested by the plaintiff's counsel would ensue: no issue could be taken on the parties to the grant, or their estate, nor could fraud or duress, &c. be replied. I recollect an instance within my own experience where, in an action on the northern circuit touching a water course, a grant was pleaded, upon presumption of its existence, though it could not then be found: but it was thought necessary to state the supposed names of the grantor and grantee, and the time; of all which the party gave probable evidence: and such a deed was afterwards found, verifying the presumption which had been made of it. In *Salk. 562.*, the rule is laid down, that the commencement of particular estates must be shewn in pleading, which was said to be a fundamental rule that ought not to be broken upon fancied inconveniences. The science of pleading, if well understood, may rest where it is.

GROSE, J. I did not acquiesce at the time in the judgment delivered in *Read v. Brookman*: but so it was decided. This plea however goes much beyond that; and for the reasons which have been stated in argument by the plaintiff's counsel, I think it cannot be supported.

LE BLANC, J. The plea in *Read v. Brookman* was framed consistently with all the forms of pleading deeds, except the profert of the deed itself. Every other principle of pleading deeds was maintained; and that case only went on the supposition that the deed itself might be lost, and therefore incapable of being produced. But if this plea were allowed, the next step would be for a defendant in trespass to state merely that he was possessed of the *locus in quo*(1)(2).

BAYLEY, J. concurred.

Judgment for the plaintiff.

(1) Vide *Esp. Dig.* vol. 1. pt. 2. pa. 43. (Gould's edit.)

(2) [See *Respublica v. Conter*, 1 Y. 2. *Cutts v. U. S.* 1 Gal. 69. *Bender v. Sampson*, 11 Mass. 42. *Rees v. Overbaugh*, 6 Cow. 748. *Powers v. Ware*, 2 Pick. 451. *Smith v. Emery*, 7 Halst. 53.—W.]

De Cosson v. Vaughan, in Error.

10 East, 61. June 21, 1808.

A new assignee of a bankrupt may sue in debt upon a judgment recovered by a former assignee, displaced by the Lord Chancellor; which judgment was "for damages sustained for injuries committed as well by the defendant against the bankrupt before his bankruptcy, as also against the assignee, *as such*, after the bankruptcy." For such recovery will be presumed to have been done to the bankrupt's estate and effects. And the plaintiff may declare in a general form, as having been duly constituted and appointed assignee, &c.

ON a writ of error from the Court of Common Pleas in debt, the first count stated, that *Alexander De Cosson* was summoned to answer *Thomas Vaughan*, assignee of the estate and effects of *Stephen Saxonoff*, a bankrupt, according to the form and effect of the several statutes concerning bankrupts, in a plea that he render to the said *T. V.*, as such assignee as aforesaid, 2000*l.*, &c. For that whereas in *Easter* term 45 Geo. 3, one *F. Judin*, then being assignee of the estate and effects of the said *Stephen*, then a bankrupt, according to the form and effect of the several statutes, &c. in the Court of C. B. recovered judgment against the said *Alexander*, for 173*l.* 5*s.* which in the said court was adjudged to the said *F. Judin*, as such assignee, for his damages sustained, as well by reason of certain injuries committed by the said *Alexander* against the said *Stephen* before he became a bankrupt, and also against the said *F. Judin* as assignee as aforesaid, since the said *Stephen* became a bankrupt, as for the costs and charges, &c. as by the record in C. B. appears: which judgment still remains in force, and unexecuted. And whereas after such judgment, and before suing out the original writ of the said *Thomas* (to wit) on the 24th of *February* 1807, &c. *F. Judin* was, by order of the Lord Chancellor, duly removed from being assignee of the estate and effects of the said bankrupt, and the said *Thomas* was duly constituted and appointed assignee of the estate and effects of the said bankrupt, and still is such assignee; whereof the said *Alexander* had notice; whereby an action hath accrued to the said *Thomas* as such assignee to demand and have from the said *Alexander* the said 173*l.* 5*s.* parcel, &c. And whereas the said *Alexander*, after the said *Stephen* became a bankrupt, was indebted to the said *Thomas* as such assignee as aforesaid, in 1826*l.* 15*s.* residue, &c. for so much money by the said *Alexander* before that time had and received to and for the use of the said *Thomas* as such assignee as aforesaid, to be paid to the said *Thomas* as assignee as aforesaid when the said *Alexander* should be thereunto requested: Nevertheless the said *Alexander* hath not paid the said 200*l.* above demanded, &c.; to the damage of the said *Thomas* as such assignee as aforesaid, &c. The record then stated judgment by *nil dicit*, and that the plaintiff remitted to the defendant his damages by reason of detaining the debt, and also his costs(a) and charges; and took judgment for his debt: on which error was brought, and the common errors assigned.

The questions made were two, 1st, Whether a new assignee of a bankrupt could in his own name maintain an action upon a judgment obtained by a former assignee who had been displaced by the Lord Chancellor. And if he could not; then, 2dly, whether the judgment of C. B. must be reversed *in toto*, or might be affirmed as to the last count of the declaration, which was admitted to be good.

(a) The remission of damages and costs was made in this case *pro majori cautela*, in case the first count had been held to be bad. But *quære*; the damages in debt being merely nominal, and the plaintiff being at any rate entitled to costs if one of his counts were good. Vide *Jacob v. Mills*, Cro. Jac. 343. *Frederick v. Lookup*, q. t. 4 Burr. 2018. and *Cross v. Kaye*, 6 Term Rep. 663.

Barrow argued on the first point in the negative; for the stat. 1 Jac. 1. c. 15. s. 13. only enables the commissioners to assign *debts* due to the bankrupt, and vests the property, right and interest of the *said debts* in the assignees. And the stat. 5 G. 2 c. 30. s. 31., which enacts that in case a new assignment shall be ordered, "such *debts, effects and estate* of such bankrupt shall be legally vested in such new assignee; and that he may lawfully sue *for the same* "in his own name;" cannot pass any thing which was not in the bankrupt, as part of his debts, effects and estate. But the damages recovered by the first assignee never constituted any part of the "debts, effects or estate" of the bankrupt: but where a debt created in the time of the first assignee, and suable for only by him in his own name; and could not be conveyed to the second assignee by his appointment; and consequently cannot be sued for by him, but only in the name of the first assignee, who would be a trustee for the creditors and the bankrupt's estate. [Lord *Ellenborough*, C. J. If the recovery were for an injurious conversion or spoliation of the bankrupt's property, the damages recovered would not be less a part of the debts, effects, and estate of the bankrupt, because they had been converted into a judgment to his assignee.] He also objected to the general manner in which the plaintiff was stated to be assignee. By the case *ex parte Newton* and others, 1 Atk. 97, it appears that the former assignee should join with the commissioners in executing an assignment to the new assignee; but, as it is here stated, the plaintiff might have been appointed by the Lord Chancellor, which would not make him assignee of the estate and effects of the bankrupt, and still less of any debts which only vested in the former assignee.

LORD ELLENBOROUGH, C. J. The plaintiff is stated to have been duly constituted and appointed assignee of the estate and effects of the bankrupt, and therefore we must take it here that due means were resorted to in order to constitute him such(a).

As to the second question, the case of *Hancock v. Haywood*(b) was referred to by Lord *Ellenborough* to shew that the judgment might, if proper, be affirmed on the last count only. In that case the damages were assessed separately on the several counts. And this objection was no further urged by *Barrow*. But a doubt having been thrown out whether the former judgment recovered might not have been for personal injuries committed by the defendant against the bankrupt, or against the former assignee, his lordship said, that the Court would not intend that: and in order to reverse this judgment, it ought to appear that it was for a cause for which no action could be maintained by the present assignee(c). Therefore upon the whole matter,

Per Curiam,

Judgment was affirmed in toto.

Gaselee was to have argued for the defendant in error.

(a) Vide *Tully v. Sparkes*, 2 Ld. Ray. 1548. referring to Lutw. 274.

(b) 3 Term Rep. 433. and vide *Bellou v. Ayler*, 1 Stra. 188. and *Henriques v. The Dutch West India Company*, ib. 808.

(c) Vide *Streatfield v. Halliday*, 3 Term Rep. 781.

Williams v. Sangar.

10 East, 66. June 28, 1808.

A turnpike act, imposing a toll on every carriage and on every horse passing thro' the gate, and exempting any person from paying more than once in a day for passing or repassing with the same carriage or horse, exempts the traveller from paying a second time in the day for the passage of the *same carriage*, though drawn by *different horses*, being the same in number. And another clause providing that in all cases of *carriages travelling for hire*, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages repassing with a different traveller or passenger, does not extend to *stage coaches*; the *carriage itself* not being there *hired* by the respective passengers, but only a conveyance by it; and therefore such stage coaches are freed of toll under the former clause by one payment in the day, although returning with different passengers and different horses, the horses being the same in number.

IN trespass, the declaration contained two counts for taking a horse and coach of the plaintiff, and detaining them till he paid 1s. 6d. for their release: and on not guilty pleaded, a case was reserved at the trial before *Chambre, J. at Gloucester*, which stated in substance, that the plaintiff was proprietor of a common stage coach travelling with four horses from *Bristol* to *Gloucester*, and back again. That the passengers paid a certain fixed sum for the journey, which included every expence of the coach, except for extra luggage, and the coachman's gratuity; all turnpikes being defrayed by the proprietors. That on the first of *October* 1807, the coach passed the turnpike kept by the defendant on a public road mentioned in the stat. 19 Geo. 3. c. 117, with four persons in it, going from *Bristol* to *Gloucester*, and the coachman paid 1s. 6d. the proper toll under that act, and the 37 Geo. 3, continuing and raising the toll: and the same coachman and coach repassed on the same day, with different passengers, and different horses, when toll was again demanded by the defendant, who on refusal distrained one of the horses, till the coachman paid one 1s. 6d. for the toll. That proper notices were given under the act before the action, and no tender of damages was made. That the coach went and returned every day, whether there were any passengers in it or not, and also carried parcels for hire. (The case also stated a usage at this and other turnpikes near *Bristol*, as to taking toll; which was agreed to be of no weight.) That on the 2d of *October* the same coach under exactly similar circumstances, except that it returned with the *same horses* which went through in the morning, was stopped, and a horse distrained, until the toll of 1s. 6d. was paid. The question reserved was, whether the plaintiff under the clause in the the act 19 Geo. 3. c. 117, (p. 599,) were liable to pay toll on the return of the said carriages on the same day as before mentioned, or for either of them: and the verdict was to be entered accordingly. By one clause of the act the toll is imposed, as usual, so much on such and such carriages drawn by so many horses; and so much on every horse, &c. By another clause "No person shall be subject to the payment of toll more than once in any one day for passing and repassing with the same horse, &c. or carriage, through the same turnpike: nor shall any person be subject to the payment of toll for the passage of any horse, &c. or carriage, in the same day through more than one turnpike on the several roads specified." By another clause "no person who shall have paid the toll for the passage of any horse, &c. or carriage, through any turnpike gate (on certain roads) shall be subject to the payment of any toll in the same day, for the passage of the same horse, &c. or carriage, through any other turnpike gate," (on certain other roads.) Then by the clause in question, "in all cases of *carriages travelling for hire*, the traveller or passenger, travellers or passengers, conveyed therein, shall

"be considered as the person or persons paying the toll; and such payment shall not exempt such carriages repassing with a different traveller, &c. but he or they shall be liable to pay the toll, as if the carriage had not before passed that day." (a) -

Wigley for the plaintiff; after observing that the coach had returned through the turnpike on the same day, in one instance with different horses and different passengers, contended that this was not a *carriage travelling for hire* within the meaning of the clause in question. The toll is put on the carriage, and it matters not whether it be drawn by the same or different horses in its progress and return on the same day: and the act makes no such distinction. It must of course be paid by the owner. There is a distinct toll on horses not drawing carriages. The exemption is general, that no person shall be subject to the payment of toll more than once a day for passing or repassing with the same horse, or carriage. Then the clause in question, having in view post-chaises and other carriages which are hired by the stage, and which may go and return several times on the same day with different persons who have hired the same, enacts, that in all cases of *carriages travelling for hire*, the traveller or passenger shall be considered as the payer of the toll; and that such payment shall not exempt the same carriage repassing with a different traveller from being liable to pay the toll. That does not apply therefore to a case like the present, where neither of the passengers can be said to be the *hirer* of the carriage, and where the owner or his coachman pays the toll. As it is clear that a person travelling in his own carriage, and paying the toll, would not be liable to pay it again for repassing with the same carriage and different horses in the same day; so neither can it apply to a stage coach returning in the same day; the tax being imposed in both instances on the carriage, and not on the passengers or on the horses. [*Le Blanc, J.* Suppose the coach returns without any passengers; who shall be said to be the *hirer*? *Lord Ellenborough, C. J.* The man who takes a place in a stage coach cannot be said to be the *hirer* of the stage coach: he only hires a place in it.]

Abbott, contra. It must be admitted that the usage signifies nothing in such a case; (which was acceded to by the Court.) The duty is not laid on the carriage in the case of public carriages let to travel for hire, but on the traveller or passenger; although by agreement the owner of the coach may take the payment upon himself. *Travelling for hire* is the very term made use of in the stat. 28 Geo. 3, c. 57, with respect to stage coaches, regulating the number of outside passengers. [*Le Blanc, J.* Would you contend that that act included post-chaises?] The title of it sufficiently shews what description of carriages was meant: but it is sufficient to say that the same term is there used to designate stage coaches. [*Lord Ellenborough.* The term was there used as contradistinguishing public carriages, travelling for hire for the purpose of taking up passengers, from private carriages.] A stage coach travels for hire, though not hired by one person.

Lord ELLENBOROUGH, C. J. In the construction of these tax acts, we must look to the strict words, however we may sometimes lament the generality of expression used in them; but we must construe those words according to their plain meaning, with reference to the subject-matter. Now here the toll is specifically imposed on every carriage, &c.; though it must of course be paid by some person passing with such carriage, as it cannot be paid by the carriage itself. Then there is a clause exempting any person from the payment of toll more than once a day for passing or repassing through the turnpike with the same horse, &c. or with the same carriage. Then comes a narrowing clause, (the clause in question) whereby in all cases of *carriages travelling for hire*, the traveller or passenger conveyed therein shall be considered as the

(a) The same or the like clause in substance are to be found in most of the turnpike acts.
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person paying the toll : and such payment shall not exempt such carriages repassing with different travellers, &c. on the same day. The question is, whether a stage coach is a *carriage travelling for hire* within the meaning of this clause ? Now advertng to what is the usual mode of travelling, it appears intended only to apply to post-chaises and other carriages which are frequently hired to pass and re-pass on the same road with different travellers, on the same day ; and where the respective travellers may properly be said to have hired the carriage, each in his turn. In these cases the payment of the toll by one traveller hiring the carriage was meant not to exempt any other traveller who happens to hire the same carriage on the same day. The only difficulty which could arise in the case is founded on the similarity of expression in another act, which clearly attaches on stage coaches : but the answer has been given to that : it merely pointed to the distinction between carriages of a public nature and used for public purposes, and carriages used for private purposes. But here we must look to the difference between what strictly speaking is a traveller or passenger *hiring a carriage*, and one who only hires a *place* in a carriage, but cannot be said to hire the carriage itself. That is a distinction well understood, and where the travellers do not hire the carriage itself, but only their respective places, it appears not to be within the meaning of the clause.

GROSE, J. The distinction is very plain. If the owner of the carriage or of the horses, or his servant, have paid the toll once in the day, he is exempt from paying it again in respect of the same carriage drawn by the same number of horses, or in respect of the same horses where there is no carriage. But in the case of carriages travelling for hire, that is when the traveller hires the carriage itself, the toll is not upon the carriage, but upon the traveller in respect of the carriage so hired ; and therefore if there be a different traveller hiring the same carriage and repassing the gate on the same day, though with the same horses, he is liable to pay the toll the same as the first : but that is not the case with passengers in a stage coach ; they do not hire the coach, but they hire their respective places in it : and the carriage itself is under the controul of the owner or his servant who pays the toll. Post-chaises returning on the same day without having been again hired, it is well known do not pay the toll again, which had been before paid by the traveller who hired it.

LE BLANC, J. Two questions are submitted to us : first, whether this were a *carriage travelling for hire* within the meaning of the clause, having the same horses ; and if not, secondly, whether returning with a change of horses made any difference. Upon the first, the only difficulty is upon the same words having been used in another act to denote a stage coach ; but the different intent with which that act was passed is an answer to it. But here the legislature, speaking of a carriage travelling for hire, where the traveller was not to be exempt from the payment of the toll on account of the carriage having before paid toll on the same day when hired by another, must be understood where the whole carriage is hired. For if stage coaches had been intended to be included, it is difficult to say why they were not specifically mentioned. I do not think therefore that they were meant to be included by the description of *carriages travelling for hire*, as here used. 2dly, I do not think that the change of horses on the return of the coach makes any difference. For by advertng to the clause imposing the duty, it is imposed on every carriage, &c. and on every horse, &c. : it is not laid on *the horses drawing a carriage*, but on *the carriage drawn by so many horses*, and the toll which is laid on horses evidently means horses passing through the gate without drawing a carriage : where the toll therefore is upon the carriage, it makes no difference whether drawn by the same or different horses on its return. Besides, if it were otherwise, a difficulty would arise : for a stage coach might pass through one gate without any passenger : and would the toll be then payable ? It might then pass through a second gate with one passenger ; through a third

with two or three passengers, or with different passengers: and would there be a new toll to pay at each gate as for different travellers and different hirings?

BAYLEY, J. agreed upon both points.

Postea to the plaintiff.

Cheasley v. Barnes, Scholey, Domville, and Shapcutt.

10 East, 73. June 23, 1808.

Where the plaintiff complains of a single act of trespass in each count, each of which is justified by the defendant in his several pleas, the plaintiff cannot in his replication take issue upon the facts of such justification, and also newly assign either the same or different matters; such replication and new assignment being double. And the objection is sufficiently pointed at by assigning as special cause of demurrer, that each plea containing a distinct justification to the single act of trespass alleged in breaking and entering the plaintiff's close in the first count, &c. the plaintiff had by his replications and new assignment attempted to put in issue several distinct acts of trespass in breaking and entering the same close, &c.

A sheriff justifying, in trespass, under a writ of *feri facias*, need not shew its return; the distinction being in this respect between a justification under mean process, and under process in execution, at least where in the latter case no ulterior process is necessary to complete the justification.

THE plaintiff declared in trespass, for that the defendants on the 15th of March 1806 broke and entered his close called the *Farm Yard* at *Hayes* in the county of *Middlesex*, and there seized and took a quantity of manure, and detained it until afterwards, on the same day, and on divers other days, between that and the day of exhibiting the plaintiff's bill, they took it away from the said close. The second count was for taking and carrying away the manure generally. The third count charged the defendants with breaking and entering other closes of the plaintiff at *Hayes*, on the 16th August 1805, and trampling down and spoiling the corn, grass, and herbage, and damaging and seizing and taking crops of wheat then growing, and keeping possession of the crops, until afterwards, on the same, and on divers other days, &c., they cut down and reaped the crops and carried them away. The 4th was a general count, for taking and carrying away the corn. Pleas, 1st, not guilty to the whole: on which issue was joined. 2dly, as to breaking and entering the plaintiff's close called the *Farm Yard* in the first count, *actio non*, &c. because one *P. Combes* since deceased, and the defendant *Barnes*, before the trespass complained of, viz. in *Easter* 43 Geo. 3, recovered judgment in *B. R.* against one *T. Combes* for 3000*l.*, &c. upon which on the 28th November 45 Geo. 3, a writ of *pluries feri facias* issued, directed to the then sheriff of *Middlesex*, for levying the debt and damages on the goods of *T. Combes*, so that the said sheriff might have that money before the king at *Westminster* on *Wednesday* next after eight days of *St. Hilary*, to be rendered to *T. Combes* and *Barnes*; which writ afterwards before the return and before the trespass complained of, viz. on the 12th December. 45 G. 3, was delivered to the other defendants, *Scholey* and *Domfield*, the then sheriff of *Middlesex*, to be executed; by virtue of which they, as such sheriff, on the 14th of December 45 Geo. 3, made their warrant to the other defendant *Shapcutt*, commanding him of the goods of *T. Combes* to levy the debt and damages, &c.: which warrant was delivered to *Shapcutt* to be executed. And then the defendants aver, that at the time of issuing the said writ and warrant, and at the time when, &c. there were divers goods of *T. Combes* in the said close called the *Farm Yard* in the sheriff's bailiwick; wherefore *Scholey* and *Domville*, as such sheriff, and *Shapcutt*, as their bailiff, and *Barnes* in his aid and by his command, after the making of the warrant, and before the return of the said writ, entered the said close, and seized and took away the plaintiff's goods therein in execution,

&c. The third plea was the same in substance as the last ; only stating, that at the time of issuing and delivering the writ of execution to the sheriff against *T. Combes*, and at the time of issuing and delivering the sheriff's warrant to *Shapcutt*, and before the plaintiff had any thing in the close in which, &c., *T. Combes* was lawfully possessed of the said close and divers goods then and there being therein ; for which reason the defendants *Scholey* and *Domville* as such sheriff, and *Shapcutt* as their bailiff, and *Barnes* in his aid, &c. and by his command, entered the said close then being in the possession of *T. Combes* to seize and take in execution his said goods then being in the said close and did seize and take them by virtue and in execution of the said writ and warrant, and detained the same there for a reasonable and convenient time in order to sell and remove the same : and that afterwards and before the expiration of such reasonable and convenient time the plaintiff became possessed of the said close, the said goods still remaining therein, and still being in the custody of the defendants in execution as aforesaid, &c. and that the defendants as soon as they conveniently could after the plaintiff became possessed of the said close, and as soon as purchasers of the said goods could be found, to wit, on the same day and year as mentioned in the first count, peaceably entered into the said close to sell and remove the said goods of *T. Combes* so being in the said close in which, &c. in their custody in execution, &c. and did sell and remove the same, &c. Fourthly, the defendants, as to breaking and entering the plaintiff's closes in the 3d count mentioned and tramping down and spoiling the corn, &c. and damaging the soil, pleaded, the same as in the last plea ; the judgment recovered against *T. Combes*, and the writ of execution issued thereon to the sheriff, and their warrant to *Shapcutt* ; and that before the plaintiff had any thing in the said closes in which, &c. *T. Combes* was lawfully possessed of the said closes, and of divers crops of wheat, &c. then and there growing ; wherefore *Scholey* and *Domville* as such sheriff, and *Shapcutt* as their bailiff, and *Barnes* in his aid, &c. entered the said closes in the possession of *T. Combes* to seize and take in execution the said crops of corn then growing there, and then and there seized and took the same in execution by virtue of the said writ and warrant, and continued in possession of the same crops for a reasonable and convenient time until they should be in a fit state to be sold and cut down, reaped and taken away, and until buyers could be found, &c. and that before the said corn was in a fit state to be sold and cut down, reaped and taken away, the plaintiff became possessed of the said closes, &c. and then this plea continued and concluded the same as the last.

The plaintiff replied to the second (the first special) plea, admitting the judgment recovered against *T. Combes*, and the writ of *pluries fieri facias* issued thereon ; but that the defendants of their own wrong, and without the residue of the cause by them in that plea alleged, broke and entered the farm-yards close, &c. and concluded to the country : and they pleaded the like replications to the third and fourth pleas respectively. And then the plaintiff pleaded further, by way of new assignment, that he brought his action against the defendants, for that they broke and entered the farm-yard close in his possession after the return of the writ in the 2d and 3d pleas mentioned, viz. on the 15th of March 1805, for the purpose of seizing, and taking the manure in the first count mentioned, then being the property of the plaintiff there found, and no part thereof being at that time liable to be seized and taken in execution of the said writ or warrant or otherwise as in the 2d or 3d plea supposed. And, also for that the defendants committed the several trespasses in the introductory part of the 4th plea mentioned, on the 16th of August 1805, for the purpose of seizing and taking possession of the crops of wheat in the third count mentioned, then being the plaintiff's property, and no part of such crops being at that time liable to be seized in execution of the said writ or warrant, &c.

The defendant demurred specially to the replications to the 2d and 3d pleas, and to the new assignment; because each of those pleas containing a distinct answer and justification to the single act of trespass alleged in the first count, to which they were respectively pleaded in bar, and upon which pleas the plaintiff could not by law put more than a single fact in issue; he had by his replications and new assignment attempted to put several distinct facts in issue upon each of those pleas. And because the replications and new assignment to those pleas were double and multifarious, and no one certain or definite issue could be taken on either of them. And because the plaintiff, having by his first count complained of one single act of trespass as to breaking and entering the close therein mentioned, had by his replications and new assignment attempted to introduce and put in issue several distinct acts of trespass with respect to breaking and entering the same close. And as to the replication and new assignment to the 4th plea, the defendant also demurred, and alleged for special causes, that that plea containing a distinct answer and justification to the single act of trespass alleged in the 3d count, to which it is pleaded in bar, the plaintiff had by his replication and new assignment thereto attempted to put the several distinct facts in issue, &c. (the same as before.)

Abbott in support of the demurrer. The plaintiff declares in his first count for one breaking and entering of his close on a single occasion. The defendants justify that breaking and entering under a judgment recovered and process of execution thereon, *before the return of the writ*, under which they took the goods. To which the plaintiff replies, admitting the judgment and writ of execution, that the defendants broke and entered of their own wrong, without the residue of the cause by them pleaded: by which he puts in issue the sheriff's warrant to levy; that the goods taken were in the close broken and entered; that they were liable to be taken in execution under that writ, and were taken before the return of the writ^(a). Besides which, the plaintiff goes no further, in the form of a new assignment, to plead that the defendants broke and entered the close, &c. *after the return of the writ*, for the purpose of taking the goods mentioned in the first count, which were not liable to be taken under the execution. The 3d plea and replication thereto are substantially the same. The 3d count also charges one other fact of breaking and entering of the plaintiff's closes at another time, and spoiling the crops, and damaging the soil, and keeping possession of the growing crops, and afterwards cutting down and taking them away. To which the defendants pleaded, 4thly, as to the breaking and entering, and spoiling the crops, and damaging the soil, the like justification under the judgment writ, and warrant against *T. C.* then lawfully possessed of the close and of the crops: and then as to the keeping possession, that it was for a reasonable time till the growing crops were fit to be cut and taken away; that during this reasonable detention the plaintiff became possessed of the closes; and that the defendants, as soon as they could conveniently afterwards entered peaceably to take the goods, still being in their custody in execution, and did take and remove the same. The replication to this plea also first puts in issue all the facts therein stated, except the judgment and writ of execution, by the *de injuria*, &c. as to the residue: and then again by the new assignment the plaintiff alleges that the defendant committed the trespasses mentioned in the introductory part of that plea, namely, the breaking and entering, &c. and spoiling the crops, and damaging the soil, for the purpose of taking the crops, which were then the plaintiff's property, and not liable to be taken under the execution: which is in effect pleading another replication, without introducing any new fact of breaking and entering, and thereby putting the same facts twice in issue; which cannot be done. It is an attempt to *reply double*, when the statute only enables the defendants to *plead double*: and this was held ill in *Adney v. Vernon*, 3 Lev. 243. Where

(a) Vide for this form of pleading *Crogate's case*, 8 Rep. 67.

the declaration charges a breaking and entering of the plaintiff's close on different days, if the defendant plead a justification which in the form of it embraces the whole declaration, the plaintiff may by his new assignment shew that he broke and entered on different days, and for other purposes than those justified; and there is no inconsistency in that, because the defendant's justification may apply in evidence to different days and purposes from what the plaintiff complains of.

Marryat, contra, contended, first, that the replication was not double: for the new assignment was explanatory only of what went before, and not cumulative. It does not allege that the plaintiff brought his action as well for the trespasses originally complained of as for those newly assigned; nor does it allege any new trespass; it rather confines the cause of action originally declared on. The plaintiff does not require to recover damages for more acts of trespass than one. 2dly, The duplicity, if any, is not sufficiently pointed out by the causes of demurrer stated, which it ought to be with precision; as in *Lamplough v. Shortridge*, Salk. 219. Com. Rep. 115, and *Ryley v. Parkhurst*, 1 Wils. 219. In *Robinson v. Rayley*, 1 Burr. 316, the duplicity contended for was distinctly assigned.

The Court were clearly of opinion against the plaintiff on both grounds. First, they held that the replication was double. It was an attempt by a new assignment to amplify the cause of action stated in the first count. The plaintiff declared in that count for one breaking and entering respectively in the first and third counts: these were severally justified, and after issues taken on those justifications, he attempted to make a new assignment of other matter; which was irregular. They said it was the same as if, to an action of trespass for breaking and entering the plaintiff's close, generally, in such a parish, the defendants were to plead that the trespass complained of was in a close there called *Whiteacre*, which was his own soil and freehold; and then the plaintiff were to reply, admitting that it was in *Whiteacre*, and taking issue upon the defendant's soil and freehold; and after that, should go on to state that he meant also to go for a trespass in *Blackacre*: which was not allowable. So with respect to the single act of trespass complained of in the third count; that also was justified; and after taking issue on the matter of that justification, the plaintiff, without alleging any different fact, made a new assignment of the same matter: so that there would be two issues to be taken on the same fact. They observed that the object of a new assignment was to give the go-by to all that the defendant had pleaded, by saying that the trespass stated and justified by the defendant was not that which the plaintiff had complained of in his declaration, but some other which is stated.⁽¹⁾ Secondly, they said, that the duplicity complained of was sufficiently pointed out in the special causes of demurrer, which stated, that the plaintiff, having by his first count complained of *one single* act of trespass as to breaking and entering the close there mentioned, had by his replications and *new assignment* attempted to introduce and put in issue *several distinct acts* of trespass, with respect to breaking and entering the same close, &c.^(a)

(1) As to the nature and use of a new assignment, see 1 Chitty on Plead. 601. & seq.

(a) A similar question arose in the case of *Franks v. Morris*, which also stood in the Paper for argument. The plaintiff declared against the defendant for an assault and battery on the 28th of May 1807, and throwing the plaintiff on the ground, whereby he broke his leg, and expended 50l. on the cure of it: and, in a second count, for the assault and battery generally. To which the defendant pleaded, 1st, not guilty. 2dly, as to the assault and battery and throwing on the ground, in the first count mentioned, he pleaded *non assault*. The plaintiff replied, as to the second plea, and the several introductory trespasses there attempted to be justified, that the defendant of his own wrong, and without any such cause as in that plea mentioned, made the assault and committed the several trespasses in the introductory part of that plea mentioned: and concluded to the country. And then new-assigned that the defendant beat him and threw him on the ground, in manner and form as the plaintiff had complained of, in a more violent and unreasonable manner than was necessary for the defence of

Marryat then objected to the defendant's pleas, That the writ of *pluries fieri facias*, under which they justified, though returnable long before the action brought, was not shewn to have been returned, as required by the terms of it. It has been suggested that this is only necessary in the case of mesne, and not in the case of judicial process: but in *Freeman v. Bluit*, Salk. 410, and 1 Ld. Ray. 632, it was said, that the sheriff cannot justify under a *feri facias* or *capias* without shewing the return of it. The true distinction is between a justification by the principal officer himself, and by his bailiff: the former must shew the writ returned, but not the latter: and it was more necessary in this case than in any other, where the sheriff has made a partial execution only. [Lord *Ellenborough*, C. J. asked if he were aware of the case of *Rowland v. Veale*, Cowp. 18; where, in the case of a justification by the party and officers under a writ of *capias ad satisfaciendum* issued out of an inferior court, it was held not necessary to shew the return of the writ.] There may be a difference between an execution against the person, which is final, and an execution against the goods, which may be executed at different times: and, at any rate, that case stands singly against the other decisions. And it is the more necessary for the sheriff to justify himself strictly in this case, where the previous entry and seizure by the sheriff of the growing crops is afterwards to be enforced against a purchaser who comes in without knowledge of the impending execution.

LORD ELLENBOROUGH, C. J. The case of *Rowland v. Veale* is an answer to this objection, where the distinction was taken generally between mesne process, and process in execution, and that in the latter case it was not necessary to shew the return of the writ. I would only add to what is there stated, that if any ulterior process in execution against the goods is to be resorted to, to complete the justification, there it may be necessary to shew to the Court the return of the prior writ of *feri facias*, in order to warrant the issuing of the other. But if no ulterior process be required, it can be no more necessary to shew the return of the writ of *feri facias* under which the officer justifies, than a writ of *capias ad satisfaciendum*.

Per Curiam,

Judgment for the Defendants.

The King v. Samuel Shakespeare.

10 East, 83. June 27, 1808.

One indicted for a misdemeanor may plead in abatement a misnomer of his surname, *Shakepear* for *Shakespeare*; which shall not be taken for idem sonans; and the plea, concluding with *praying judgment of the said indictment, and that he may not be compelled to answer the same*, is good.

THE defendant was indicted by the name of *Samuel Shakepear*, for an assault on *F. Newberry*, at *Portsmouth*; to which he appeared by his right name, and prayed judgment of the indictment, because before and at the time of the indictment he was always called and known by the surname of *Shakespeare*, and not by the surname of *Shakepear*, by which he is indicted, &c. Wherefore the said *Samuel Shakespeare* prayed judgment of the said indictment, and that they may not be compelled to answer the same. To this there was a general demurrer and joinder.

Laves objected to the plea, 1st, That a defendant in an indictment cannot plead in abatement a misnomer of his surname, 2 *Hawkin's P. C.* ch. 25.

himself, as in the second plea mentioned, and when it was not at all necessary, and thereby wounded him, &c. To which there was a demurrer, assigning the same special causes as in the last case. And after the decision of that case, the argument of this, which was admitted to involve the same question, was abandoned, and leave was prayed by the plaintiff's counsel, and given by the Court, to amend.

a. 68.(a). The reason probably is that surnames may be assumed or laid aside at pleasure. [Lord *Ellenborough*, C. J., after noticing the authority of Lord *Hale*, as leading to a different conclusion from that which had been drawn by *Hawkins*, observed, the argument now used would go to shew that the misnomer of a surname could not be pleaded in abatement even in civil actions.] 2dly, This is no misnomer, being *idem sonans*, though differently spelt. [Lord *Ellenborough*, C. J. The final *e* might not make a material difference, but the omission of the *s* in the middle makes it a differently sounding name from the true one.] 3dly, There is no proper conclusion of the plea; no prayer of judgment; and therefore the court are not bound to give judgment; as if only an improper judgment were prayed. The conclusion is not adapted to the subject-matter of the plea; for it goes to the jurisdiction of the Court, rather than to the form of the indictment; the prayer ought to be, as was said in *Bowyer v. Cook*, 1 Ld. Ray. 64. 5 Mod. 146, *quod billa casseter*. [Bayley, J. In the report of that case in 5 Mod. Lord *Holt* only says that the plea should begin, "*Petit judicium de billa*;" and afterwards, that it must have "its proper conclusion."

Dampier, contra, upon the last point observed, that the defendant, in the beginning and in the conclusion of his plea, *prays judgment of the indictment*; by which he must be understood to pray that the indictment should be quashed: and the rest of the prayer, *that he may not be compelled to answer the same*, if beyond what the defendant ought to ask, may be rejected as surplusage. But he referred to *Cadman v. Grendon*, Latch. 178, where the doctrine of the conclusion of pleas was much discussed: and there it is said, that the prayer in the conclusion of a plea to the *person* is "if he shall answer." And to a more modern authority, in point, of *The King v. Matthew Westby*, alias *Westly*, T 4 Geo. 1. (which he read from a copy of the record(b), fur-

(a) The Court asked what authority was cited in the book for this? The quotations are as follow: 1 Hen. 5. 5, which was a case of treason; but the rule is there laid down generally, that one indicted of felony cannot plead a *misnomer*. Hale's Sum. 243, which cites the above, and applies the same rule, as to misnomers of surnames, to treason and felony. Staunf. P. C. 181. cap. 18, which agrees with the Summary. 6 Hen. 6. 26, which is an obiter dictum of the same rule as applied to a misnomer of the baptismal name in felony. Thel. B. 11. c. 5. s. 14. and *Rex v. Sherman, Idle, and Others*, Rep. Temp. Hardw. 303, where to an indictment for a misdemeanor, *Idle* pleaded a misnomer of his surname in abatement: and for want of a replication by the king's coroner, judgment was entered, that he be dismissed and discharged from the premises specified in the said indictment, and that he depart without day. And the prosecution went on against the other defendants, who pleaded not guilty and went to trial.

Lord *Hale*, 2 vol. P. C. 175-6, after stating the rule as laid down in 1 H. 5. 5, and in Staunf. P. C. that a mistake of the surname in an indictment shall not abate it, adds a *quære*; and afterwards says that it is the safest way to allow the plea of misnomer both as to surname and christian name. And in a subsequent page (238) he says, that if the defendant in appeal or indictment plead misnomer of his surname, the plaintiff or king may aver *que conus per un nosme et l'autre*; and a note there subjoined observes upon the original case in 1 H. 5. 5, that Fitzh. Coron. 274 in his abridgment of it, makes a *quære*, if the misnomer were in the name of baptism. See also Layer's case 6 Sta. Tr. 237.

(b) *REX v. MATTHEW WESTBY*, alias *WESTLY*, E. 3 Geo. 1. Rot. 28.—This was an information filed by the Attorney-General in Easter, 3 Geo. 1. against the defendant for a misdemeanor in assaulting one *Benjamin Carter*, a constable of the ward of *Farringdon Without* in the city of *London*, in the execution of his office, &c. To which, in the same term, *Mathew Westly*, by his attorney *R. H.*, appears, and says that he is the person intended by the name of *Mathew Westby* alias *Westly*, &c. and that he ought not to be compelled to answer to the information, because his right name is *Mathew Westly*, and that he was never known by the name by which he is charged in the information, &c. and this he is ready to verify, &c. Wherefore, &c. he prays judgment of the said information, "*et si ipse ad informationem illam ulterius respondere compelli debeat*." To this the Attorney-General, in Trin. 3. Geo. 3. demurred specially, for that the defendant pleaded by attorney, without any special warrant, &c. when he ought to have pleaded in person: and also "*quod idem placitum haud apte formatum et incertum est*." The defendant joined in demurrer &c. "*unde ut prius petit judicium de informatione predicta, et si ipse ad informationem illam ulterius responderi compelli debeat*," &c. And on the last day of Trinity term, 4 Geo. 1, the following rule was entered: "*Super maturam deliberationem hic in curia habitam ordinatum est, quod judicium intretur pro defendente*."

Per Curiam."

nished by Mr. *Dealtry*,) where the conclusion of a plea in abatement to an indictment for a misdemeanor was the same as in the present case ; and one of the causes of demurrer stated was that it was inaptly formed ; which was overruled. 1 Com. Dig. 31. Abatement, F. 18, mentions the same case ; and that it was so ruled by three Justices, (viz. *Pratt*, C. J. *Littleton*, and *Powys*,) against *W. Fortescue*, J. What was said in *Powers v. Cook* as to the proper conclusion applies only to pleas in civil actions ; and the doctrine is certainly laid down too largely in the report of Lord *Raymond*, that the conclusion must be *quod billa cassetur* ; for that would not apply to a plea in abatement on account of the excommunication of the plaintiff. And this conclusion seems more proper where there is no apparent vice on the face of the plea, but the only objection is that in fact it does not apply to the defendant.

Lawes, in reply, said, that it did not appear that the particular objection now taken was made in the case of *The King v. Westby* : and it is the less likely that it should, as the only special cause of demurrer there assigned was of another sort, to which the attention of the Court was probably called. The utmost strictness is required in pleas in abatement, even in civil actions, and *a fortiori* in criminal cases : and therefore in *Hizon v. Binns*,³ Term Rep. 185, the Court gave judgment against a plea of misnomer in abatement, because it concluded with praying that *the bill might be quashed*, instead of praying *judgment of the bill* : and *Bowyer v. Cook*, 5 Mod. 146, and all the cases shew that it is not enough that it appears by the subject-matter of the plea in abatement that the suit ought to abate unless there be also a proper beginning and conclusion, praying a proper judgment.

Lord ELLENBOROUGH, C. J. Praying judgment of the indictment means no more than praying judgment on the indictment : and if this were the case of a plea in bar, the Court would give that judgment, which, upon the whole of the record, appeared to be the proper judgment, though not regularly prayed for by the party ; according to the opinion of *Montague* C. J. Plowd. 66, which he had once before occasion to advert to in a case before us (a). But in abatement the Court will give no other than the proper judgment prayed for by the party. And if it had not been for the precedent cited of *The King v. Westby*, I should have been much inclined to think this plea bad in that respect ; and that the prayer ought to have been that the indictment should be quashed. And without the defendant prays a particular and proper judgment in abatement, the Court are not bound to give the proper judgment upon the whole record, as they would be in the case of pleas in bar (1). Here, however, is a precedent produced, and which appears to have undergone much consideration at the time, and was afterwards referred to by the learned Judge who compiled the digest as a precedent proper to be remembered ; and according to that, the conclusion of this plea is good, and therefore our judgment must be pronounced accordingly ; and if the prosecutor is desirous to have the question further considered, he may bring a writ of error.

The other judges assented : and the following judgment was afterwards entered up :

“ WHEREUPON all and singular the premises being seen and fully understood by the Court of our said Lord the king, now here, and mature deliberation had thereupon, it is considered and adjudged by the said Court here, that he the said *Samuel Shakespeare* be not compelled to answer the said indictment, but that he depart hence without day in this behalf.” (2)

(a) *Le Bret v. Papillion*, 4 East, 502. 509, and see *Carnley v. Winstanley*, 5 East, 271.

(1) Vide *Jenkins v. Pepoon*, 2 Johns. Ca. 312. *Illaley & al. v. Stubbs*, 5 Mass. Rep. 280. 285.

(2) Vide *Petris v. Woodworth*, 3 Caines, 219.

The King v. The Inhabitants of Cowhoneyborne.

10 East, 88. June. 29, 1808.

A widower having a daughter, placed her at 11 years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service for him, but without any contract of hiring to give her a settlement of her own; the father in the mean time having gone out to service. Held that on her coming of age she was emancipated, although her father conceived himself bound, as such, to receive and support her if she left her uncle's: and consequently the father was capable of gaining a settlement by hiring and service for a year, as "an unmarried man, not having a child." (i. e. not having a child who would follow his settlement) within the stat. 3 W. & M. c. 11. s. 7.

TWO justices by their order, dated September 8th, 1807, removed *William Gray*, a pauper, from *Teddington* to *Cowhoneyborne*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

The pauper *W. Gray*, being legally settled in *Cowhoneyborne*, sometime after the death of his wife, who died in childbed fifteen years ago last *Whitsuntide*, went to service, and hired himself to one *Clarke* of *Cowhoneyborne*, who afterwards removed to *Teddington*, and the pauper left him at *Michaelmas* last 1806, having served him the five preceding years under a hiring for a year in *Teddington*. On the death of the pauper's wife, *W. Nightingale*, who had married his sister, took to and maintained the infant, of which she had been delivered, out of kindness to the pauper; and the pauper's daughter, *Elizabeth*, then about 11 years of age, went, with the pauper's consent, to *Nightingale*, for the purpose of nursing her infant sister. The infant died in about a year: and from that time to this she has continued to live in the house of *Nightingale*, as one of the family, but doing the work of a servant. *Nightingale*, who, previously to the pauper's daughter living with him, kept a servant, would have hired a servant if she had left him: but he never hired her, or paid her any wages; though he found her in board, clothes, and such pocket-money as he thought fit. The said *Elizabeth* will be 27 years of age in June 1808. During all the time she so lived with *Nightingale* she considered herself as liable to be sent away whenever he pleased; and he considered her as at liberty to quit him when she chose; and the pauper conceived himself, as her father, bound to receive and support her if *Nightingale* ceased so to do. But the pauper was not a house-keeper at any time after he went into *Clarke's* service. The pauper's daughter *Elizabeth* was never hired as a servant to *Nightingale*. The question intended for the opinion of the Court was, Whether the pauper's daughter *Elizabeth* were, under the circumstances of the case, so emancipated, as to enable the pauper to gain a settlement by his service with *Clark* in *Teddington*, under such hiring as aforesaid?

Park, Peake, and *Petit*, in support of the orders, contended that *Elizabeth*, the pauper's daughter, was not emancipated from her father's family at the time of his service with *Clark*, and consequently that he could not gain a settlement in *Teddington* by such service, not being an "unmarried person, not having child," whithin the stat. 3 W. & M. c. 11. s. 7. and the cases which have settled the construction of that clause. It is clear, that *Elizabeth* did not live with *Nightingale* in the character of a servant, but as one of his family, and that she had not gained any settlement in her own right. And it is equally clear, that the mere circumstance of her being of age did not emancipate her; for though in *The King v. Roach*, 6 Term Rep. 247, an adult leaving her father's house, and going into service, was held to be emancipated, as having contracted a relation inconsistent with parental controul; yet Lord *Kenyon* expressly disavowed an opinion which had been attributed to him in the case of *Whitton* cum *Twambrookes*, 3 Term Rep. 355, that the mere cir-

circumstance of a child's attaining 21 was an emancipation (a). The only established cases of emancipation are, 1. by the child gaining a settlement of his own; 2. by marrying and becoming the head of another family; 3. by contracting, after being of age, a relation inconsistent with parental authority. The only question is, Whether this case falls within the last class? But here she contracted no new relation with her uncle; and her father could at any time have recalled her to him, at least before she came of age. Then whether at that time there still remained the *animus revertendi* on her part, and the *animus recipiendi* on the part of the father, are matters of fact to be collected from the acts and declarations of the father and daughter, on which it was competent for the Sessions to decide, as they have done, in the affirmative. It is plain that the parties themselves considered that the daughter was still part of her father's family; and *Grase, J.* laid great stress on the intention of the parties, upon the question of emancipation, in *The King v. Roach*, as Lord Mansfield had done before in *Rez v. Tottington*, Cald. 287. In *The King v. Broadheurnbury*, H. 25 G. 3. 2 Const. 55, the father had put his daughter in the work-house at the age of 20, where she remained at the time of the order made; after which he gained a settlement in another parish, which was held to be communicated to the daughter. In *Rez v. Woburn*, 8 Term Rep. 479, the child under age was actually under another control than the father's, being a drummer in the same militia regiment with him: yet he was still considered as part of his family, being so considered by themselves. While the intention of the daughter to return to her father continued unbroken, her stay with her uncle could only be considered as temporary: and in *Rez v. Sowerby*, 2 East, 276, there was a temporary absence of the son, after he was of age, from his mother's family, for three weeks during harvest time, which was not considered as making any difference in the case. And here the residence with the uncle was by consent of the father and for his benefit. They next objected, that supposing the fact of the daughter's living apart from her father, at the time when she was of age, amounted to an emancipation, still, the facts of this case would not warrant the conclusion that the father gained a subsequent settlement in *Teddington*: for it appears that he went to serve *Clarke* in *Teddington* at *Michaelmas* 1801, under a hiring for a year; and the daughter did not come of age till *June* 1802: after which it does not appear that there was any new contract of hiring, but he went on in the service under the original contract. Now the description of the servant must be regarded at the time of the hiring and not afterwards, according to *Rez v. Allendale*, 3 Term Rep. 382, and *Rez v. New Forest*, 5 Term Rep. 478.

The Court, however, considered the pauper as having lived in *Teddington* under successive yearly hiring, the first hiring being stated to be for a year: and nothing further was said upon this point. And they thought it unnecessary to hear the *Attorney-General* and *Joseph Martin* for the parish of *Cow-honeyborne*, on the principal point.

LORD ELLENBOROUGH, C. J. The daughter having been originally placed, when an infant by her father in her uncle's family, continued to live with her uncle after she came of age as part of his family; receiving no assistance from her father; and being at liberty to depart from her uncle's when she pleased, and to go where she chose. She was of age, living apart from her father, having her support from sources independent of him, and was at liberty to quit her uncle when she pleased, as she herself considered. If this be not emancipation, it would be difficult to say what is so, and when it can take

(a) Lord Kenyon's disavowal of the opinion attributed to him in that case was qualified, namely, "if the son continued to live with the father; for if the son with unbroken continuance remain with and a member of the father's family, he is not emancipated." And the same doctrine was laid down in *Rez v. Sowerby*, 2 East, 276.

effect. Then if she were emancipated after she came of age, it follows that the father, by the construction which has been put upon the statute of King *William*, gained a settlement by the subsequent hiring and service for a year in *Teddington*, as "an unmarried person, and not having any child."

GROSE, J. The daughter lived apart from her father after she was 21, not under his controul, nor having any contemplation of it: nor receiving any assistance from him; she was therefore emancipated when her father was hired for a year, and served in *Teddington*.

LE BLANC, J. The question is, Whether any settlement gained by the father under these circumstances could be communicated to the daughter; for, if so, he could not gain a settlement by the hiring and service in *Teddington*; and that question depends upon this, whether the daughter continued to be part of his family at the time. On the death of the father's wife, he broke up housekeeping, and the daughter was sent to her uncle, with whom she continued to live from that time; he supplying her with clothes and pocket-money: and there she still remained after she came of age. Under these circumstances, living away from her father before and after the age of 21; he having no house of his own, nor giving her any support; I think she ceased, after she came of age, to be part of her father's family; and consequently no future settlement gained by him could be communicated to her; and if so, he gained a settlement by the hiring and service in *Teddington*.

BAYLEY, J. To constitute emancipation, it is clearly not necessary for the child to have acquired a new settlement of its own: the case of *The King v. Roach* is in point to that; where the daughter, being an adult, by leaving her father's house and going out to service was held to be emancipated. Now where is the difference between going out from her father's house after 21 to seek a livelihood, and continuing out for the same purpose after that age, where the absence from the father is so long as it was here: the father too, during all that time, having no house of his own, and having indeed contracted a relation which precluded him from receiving his daughter at home.

Orders quashed.

The King v. Hart and White.

10 East, 94. June 29, 1808.

An affidavit made and signed by the printer and publisher and proprietor of a newspaper, as required by stat. 38 G. 3. c. 78, which affidavit contained the names of the parties, the place where the paper was printed, and the title of it, together with the production of a newspaper, tallying in every respect with the description of it in the affidavit; is not only evidence by that act of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be: and this, upon the trial of an information for a libel contained in such newspaper.

THE defendants were the printer and proprietor of a newspaper called *The Independent Whig*, and were tried and convicted before Grose, J. at the Sittings in London, upon the prosecution of the Attorney-General, for printing and publishing in that paper a libel upon the Lord Chief Justice of this Court. The stat. 38 G. 3. c. 78. for preventing the mischiefs arising from printing and publishing newspapers, &c. by persons not known, enacts s. 1. That no person shall print or publish any newspaper until an affidavit, made and signed as aftermentioned, shall be delivered to the commissioners of stamps, &c. containing (by s. 2.) the names, &c. and places of abode of the intended printers, publishers, and proprietors of the newspaper, and the true description of the house wherein any such paper is intended to be printed, and likewise the title of such paper: which affidavit, by s. 5. shall be signed by the persons making it. By s. 6. & 7. penalties are given for the omission of a certain notice, and for printing, publishing, or vending any newspaper without mak-

ing and delivering, &c. such affidavit. Then by s. 9. all such affidavits shall be filed and kept as the commissioners of stamps shall direct; and the same or certified copies thereof "shall in all proceedings civil and criminal touching any newspaper, which shall be mentioned in any such affidavits, or touching any publication, matter, or thing contained in any such newspaper, be received and admitted as *conclusive evidence of the truth of all such matters set forth in such affidavits as are hereby required to be therein set forth*, against every person who shall have signed and sworn such affidavits;" &c. and also, "against every person who shall be therein mentioned to be a printer, printer, or publisher, &c. unless the contrary shall be satisfactorily proved." The 10th section gives another penalty against the printers and publishers, omitting to state their names and places of abode, &c. And by s. 11. "it shall not be necessary, after any affidavit, &c. shall have been produced in evidence as aforesaid against the persons who signed and made such affidavit or are therein named, according to this act, and after a newspaper shall be produced in evidence intituled in the same manner as the newspaper mentioned in such affidavit, &c. is intituled, and wherein the names of the printer and publisher and the place of printing shall be the same as mentioned in such affidavit, for the *plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act*, to prove that the newspaper to which such trial relates was purchased at any house, &c. belonging to or occupied by the defendant or defendants, their servants, &c. or where he or they, &c. usually carry on the business of printing or publishing such paper, or where the same is usually sold." And by s. 17. The printer and publisher of every newspaper shall, within six days after publication, deliver to the commissioners of stamps, &c. one of the papers, signed by such printer or publisher with his name and place of abode; which paper shall be kept by the commissioners, &c. and shall, on application, be produced in evidence in any proceeding, civil or criminal.

At the trial the prosecutor gave in evidence the affidavit sworn by the defendants, with their hand-writing thereto, and delivered to the commissioners, containing all the particulars required by the act, and amongst the rest the description of the place where the newspaper was printed, which was in *London*. And an officer from the stamp office (which is not in *London*) produced a newspaper, without stating from whence it came, containing the libel in question; which newspaper answered the whole description contained in the affidavit, and stated at the foot of it that it was printed at No. 33, *Warwick-lane, London*; and it was also proved, that the defendants' printing-house was at the same place.

Clifford now moved for a new trial, on the ground, principally, of the want of evidence that the defendants had published the libel in *London*. The 9th clause, he contended, only made the affidavit evidence of all matters set forth therein; and these, by the 2d clause, are only the names, additions, descriptions, and places of abode of the printers, publishers, and proprietors, the description of the house where the paper is intended to be printed, and the title of such paper. But this does not dispense with legal proof that the libel contained in any such paper has been published in the county where the trial is had: for a paper may be printed in one place, when the act of publication may be in another. And the defect of proof in this respect is not supplied by the 11th section, which is confined to actions or informations for *penalties* given by the act, and cannot affect the construction of the 9th or general clause, which extends to "all proceedings civil and criminal, touching any newspaper." Then as to the 17th clause, the object was that by comparing the newspaper so delivered to the commissioners with any other of the same impression, published in the county where the trial is had, the printing and publication might be brought home to the parties described in the stamp-office documents; but it could not be intended that a publication to the commissioners, un-

der the express direction of the act, should be deemed a libellous and guilty publication, without any other evidence of publication in the same place. As in the case *de libellis famosis*, 5 Rep. 126 *b.* and in *Lamb's case*, 9 Rep. 59, the delivery of a libel to a magistrate for the purpose of investigation, being enjoined as a duty, was not considered as a criminal publication. And, besides, the newspaper was only produced by an officer from the stamp-office, without any proof how it came there, or from whom it was received.

LORD ELLENBOROUGH, C. J. declined giving any opinion; and the rest of the Court were clearly satisfied that there was sufficient evidence not only of the publication, but of the publication in *London*. The reasons were most fully stated by

BAYLEY, J., who said—As to the evidence of publication, the statute was passed, as the title of it states, for the purpose of “preventing the mischiefs arising from printing and publishing newspapers by persons not known:” and it was meant to facilitate the proceedings, either civilly or criminally, against the several persons concerned in such publications. For this purpose, the act requires an affidavit to be made by the printers, publishers, and proprietors, specifying their names and places of abode, a true description of the house where the paper is to be printed, and the title of the paper. And such affidavit is made conclusive of the several facts stated in it, as against the persons signing it; unless they shew, that they ceased to be the printers before the period of the particular publication complained of. Now suppose the act had stopped there, and it had been proved, as in this case, that a paper, such as is described in the affidavit made and signed by these defendants, had been published, the affidavit is made conclusive evidence against them, that one of the defendants was the printer and publisher, and the other the proprietor of a paper so intitled, and that it was printed at the place therein described, which is within the city of *London*: that would have been *prima facie* evidence that the paper produced, tallying with that description, was published by them there; and would have called upon them to prove that it was a fabrication: and if it were, there could have been no difficulty in their making that proof. But the act goes further, and by the 11th section expressly enacts, that after such affidavit shall be produced in evidence against the persons signing the same, &c., and after a newspaper shall be produced in evidence intitled in the same manner as the newspaper mentioned in such affidavit: and wherein the name of the printer and publisher, and place of printing, shall be the same, *it shall not be necessary* for the plaintiff, informant or prosecutor, or *person seeking to recover any of the penalties given by this act, to prove that the newspaper to which such trial relates was purchased at any house, &c.* belonging to or occupied by the defendants, or their servants, &c. or where they usually carry on the business of printing or publishing such paper, or where the same is usually sold. And I cannot consider, as the objection supposes, that all these descriptions of persons, namely, *plaintiff, informant, or prosecutor, or person seeking, &c.* apply to the same person *seeking to recover penalties given by the act*; but I take those words to apply to a *plaintiff seeking to recover damages* in an action for the civil injury sustained by him from the publication of a libel: to the *informant* in an information granted by this Court, or exhibited by the *Attorney-General* for the same; to a *prosecutor*, prosecuting by indictment for the libel; or, lastly, to any *person seeking to recover penalties* under the act. Therefore, independent of the 11th section, I should have thought, that the evidence offered was *prima facie* evidence of the publication of the paper by the defendants in *London*: but, taking that section in aid, which is not confined to suits for recovering penalties, there can be no doubt that the necessity of further proof was superseded.

Rule refused.

Plimpton, Assignee of the Sheriff of Berks, v. Howell and Another.

10 East, 100. June 29, 1808.

Where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first day of term, being the return-day of the writ, and the under-sheriff signified his assent to the surrender by return of post the next day, at the distance of 17 miles; held sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment afterwards, with notice of such surrender.

THIS was an action on the bail-bond against the bail; and the principal having surrendered himself to the gaoler at the county gaol before 12 o'clock on the first day of *Easter* term, being the return-day of the writ; which surrender was not in fact accepted by the undersheriff, who lived 17 miles off, until the next day by a letter by the post; after which the plaintiff took an assignment of the bail-bond with notice of the surrender: the question was, Whether the surrender were in time?

The Attorney-General shewed cause against a rule for staying proceedings for irregularity; contending that the surrender was not effectual till the sheriff had assented to it, which was too late after the return-day of the writ. The rule is, that a party who has given a bail-bond cannot surrender even before the return of the writ without the assent of the sheriff (a): then the assent of the sheriff after the condition of the bail-bond is broken can signify nothing.

Walton, contra, was stopped by the Court.

GROSE, J. It appears to us, that the surrender was in time, and therefore that the proceedings on the bail-bond should be stayed.

LE BLANC, J. We do not mean to say that the assent of the sheriff to the surrender may be given at any indefinite time, or to any person; but this was a surrender to the gaoler of the county gaol before the return of the writ, and the assent of the under-sheriff was given the next day by letter, which was as soon after as the distance would reasonably admit of, to confirm the antecedent surrender.

Per Curiam,

Rule absolute.

Thomas v. Evans.

10 East, 101. June 30, 1808.

To make a legal tender there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration, or equivalent act, of the creditor. Therefore where the defendant, on departing from home, left 10*l.* with his clerk for the plaintiff; of which the clerk informed the plaintiff when he called and demanded a larger sum; and the plaintiff said he would not receive the 10*l.* nor any thing less than his whole demand; but *the clerk did not offer the 10*l.**: this was held to be no tender.

THE question turned upon a plea of tender of 10*l.* in *assumpsit*; on which the evidence was, that the defendant, having been employed as attorney for the plaintiff, had in that character received for his use 10*l.* in part payment, and on going from home for a time, left the 10*l.* with his clerk there. That some time after the plaintiff called and demanded 16*l.* 8*s.* 11*d.*, which he said he supposed *Evans* had received; when the clerk told him, that *Evans* was gone from home, and had left with him 10*l.* to give to the plaintiff when he called.

(a) Vide *Hamilton v. Wilson*; 1 East, 383, and vide *Jones v. Lander*, 6 Term Rep. 753. *Stamper v. Milbourne*, 7 Term Rep. 122. *Hyde v. Whiskard*, 3 Term Rep. 456, with the MS cases there cited, and *Maddocks v. Bulcock*, 1 Bos. & Pull. 325.

The plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand. (At that time no more had been received, though the remainder had been since received by the defendant.) The clerk did not offer the 10*l.* And thereupon it was objected, that this was not sufficient evidence to support the plea, and *Graham, B.* before whom the case was tried at *Monmouth*, being of that opinion, directed the jury to find a verdict for the plaintiff, for the 10*l.*; which they did.

Dauncey, in the last term, moved for a new trial, on the ground that the declaration of the plaintiff, that he would not receive the 10*l.* left with the clerk excused the latter for not holding the money out to him in his hand, and made the offer to pay it a sufficient tender in law. And he referred to *Douglas v. Patrick*, 3 Term Rep. 683, where the evidence of the tender, which was held to be good, (though joined with another sum on a different account, no objection being made on that account,) was that the defendant said "he had eight guineas and a half in his pocket, which he had brought for the purpose of satisfying both the demands:" but the plaintiff then told him, "that he need not give himself the trouble of offering it; for he would not take it, as the matter was then in the hands of his attorney." As to which Lord *Kenyon* said, that it was no objection to the tender, that the money was not actually produced, because what was said by the plaintiff superseded the necessity of it. He now supported his rule on the same ground; being called upon by the Court, who thought it unnecessary to hear *Abbot* contra.

LORD ELLENBOROUGH, C. J. The learned Judge's direction was right. The actual production of the money due, in monies numbered, is not necessary, if the debtor having it ready to produce, and offering to pay it, the creditor dispense with the production of it at the time, or do any thing which is equivalent to that. But here, on the contrary, it is expressly stated, that the clerk *did not offer the 10*l.** He only talked about having had 10*l.* left with him to give to the plaintiff when he called, without making any offer of it, which is not a tender in law.

GROSE, J. Either there must be an actual offer of the money, or the party must be ready to pay it at the time when the actual offer of it is dispensed with.

LE BLANC, J. There must either be an actual offer of the money by the one party, or a dispensation of such offer by the other; and here there was neither.

BAYLEY, J. was of the same opinion and referred to the case of *Dickinson v. Shee*, before Lord *Kenyon*, 4 Esp. N. P. 68, in confirmation of it. There the defendant went to the plaintiff's attorney, and saying that he was come to settle with him the plaintiff's account, produced a paper containing the statement of the account, in which he made the balance 5*l.* 6*s.*, which *he said he was ready to pay, but produced no money nor notes*. The plaintiff's attorney said he could not take that sum, as his client's demand was above 8*l.* This was held to be no tender: for there should have been an offer to pay by producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money as he would not accept it(1)(2).

Rule discharged.

(1) Vide *Black v. Smith*, Peake's Ca. 88. *Sheredine v. Gaul*, 2 Dall. 190. *Morton v. Wells*, 1 Tyler, 336. *Borden v. Borden*, 5 Mass. Rep. 67. *Slingerland v. Morse & al.*, 8 Johns. 474

(2) [See also *Blight v. Ashley*, 1 P. C. C. 24. *Harvey v. Hackley*, 6 W. 264. *Brown v. Dyringer*, 1 R. 408. *Thayer v. Brackett*, 12 Mass. 450. *Carey v. Bancroft*, 14 Pick. 315. A party must have the money about him, wherewith to make the tender, though, if he refused, it is not necessary to count it. *Breed v. Hurd*, 6 Pick. 356. In general, a tender is defective, if it be qualified by any thing to be done on the other side. *Brooklyn Bank v. De Grana*, 23 Wend. 342. See also *Harding v. Davis*, 2 C. & P. 77. cor *Beal*, C. J. and *Ashmole v. Wainwright*, 2 Adolp. & Ell. 887.—W.]

Peacock, Administratrix of Peacock, v. Harris.

10 East, 104. June 30, 1808.

A collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who, not long after, sent 5*l.*, enclosed in a letter to the plaintiff, in which he stated, that he should have the remainder next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls.

THE plaintiff declared, in *assumpsit*, that the defendant was indebted to the intestate as farmer and renter, appointed according to the statute, of the tolls payable at a certain turnpike-gate, and at certain cranes, engines, and weighing-machines there duly erected, for cattle and carriages of the defendant, which had travelled upon the turnpike-road and through the gate and for other carriages of his, which had travelled on the said road, and been weighed at the engines, &c.: and that being so indebted, he promised payment to the intestate, &c. There was another count for the gate tolls only, and a third on an account stated with the intestate. And there were three similar counts on promises to the administratrix. At the trial before *Chambre J.* at *Hereford*, the clerk to the turnpike commissioners produced their book, by which it appeared, that on the 3d of *May* 1803, the gates, &c. in question were let by them, in the mode prescribed by the statute, to *Peacock*, the intestate, for one year; after which he continued tenant, not under a fresh letting, in the form required by the act, but under a written contract produced from the papers of the commissioners, dated 1st of *May* 1804, signed by the intestate, and one *Mill* as his surety; under which the intestate paid his rent to the clerk; the last payment being made by the plaintiff on the 24th of *July* 1805, after the intestate's death, for the year's rent ending 1st of *June* preceding. The plaintiff's daughter then proved that she lived with her father and mother at the gate; that she kept an account of the extra toll: (*i. e.* for waggons over-weight: that her father, the intestate, had made out an account of what was due to him from the defendant, amounting to 23*l.*, which he had delivered to the defendant about two months before her father's death, who died in *January* 1805; and in *April* following she delivered to the defendant another account of 60*l.*, including charges of over-weights arising some before, some after her father's death. That the defendant afterwards sent 5*l.* inclosed in the following letter "*Mrs. Peacock*—Inclosed you have five bills, value 5*l.*, and you shall have the remainder next week. P. HARRIS. *Hereford*, *July* 31st, 1805." The defendant's counsel insisted, that the intestate had no right to the tolls; the contract, after the first year, not having been made in conformity to the act; and consequently, that the plaintiff could not maintain the action. And further, that the charges for over-weights, though contracted to be let with the other tolls, could not be so let. But it is unnecessary to enter into the latter objection, as it depended on the particular wording of the clauses in the act, and ultimately the Court thought it was not well founded. The jury found a verdict for the plaintiff for the amount of the first bill delivered, deducting the part payment; and the defendant had leave to move the Court to enter a nonsuit; which was done accordingly in the last term.

Dauncey and *Wigley* now shewed cause against the rule for entering a nonsuit, and admitted that the collector was not duly appointed under the act, and therefore that the special counts could not be maintained: but they relied upon the account stated, evidenced by the written account of the tolls sent in

to the defendant by the intestate, and by the defendant's part-payment of 5*l.*, and promise to the plaintiff to pay the remainder.

Abbot, in support of the rule, objected, amongst other matters, 1st, That the trustees must either let the tolls in the form required by the act; which it was admitted had not been pursued, and therefore no title passed to the lessee; or he can only be considered as their servant, appointed to collect the tolls for them; and then this action could not be maintained in his right. 2dly, If there were no original right of action in the plaintiff's intestate, the accounting to him or to her, would not give her a right to recover as upon an account stated. 3dly, There was no evidence of an account stated; to constitute which there must be a demand on the one hand, which is acceded to on the other: but it does not appear that the letter referred to the prior demand made for the tolls.

LORD ELLENBOROUGH, C. J. The first question is, Whether any account were stated at all between these parties? The evidence of this on the one side are the accounts sent in to the defendant: on the other, the letter from the defendant to the plaintiff after her husband's death, in which he incloses 5*l.*, and says, that she shall have the *remainder* next week. Now that must refer to the *remainder* of *some* account previously in the contemplation of the parties, which, not being specified in the terms of the letter, was to be ascertained by the jury from the rest of the evidence, and the circumstances of the case; and they by their verdict have ascertained it to relate to the account of the tolls, which it appears was before that time sent in to the defendant: and that is evidence of an account stated between them. Then it is said, that this account was stated, with respect to the intestate, in a character in which by law it could not exist, because he was not legally appointed collector of the tolls. But if the defendant accounted with him in that character, having received credit from him as such, thereby admitting him to be a person to be accounted with for the tolls, he shall not now be permitted to dispute his title to recover the balance of that account. In like manner as a tenant is taken to admit the title of the landlord under whom he holds, which he is not permitted afterwards to dispute. It is a different question, whether the commissioners might not dispute the intestate's title to receive the tolls: though that might be the ground of an equitable account. But I do not think it necessary to resort to the ground of an equitable account stated; for I go upon this, that the defendant has recognized the title of the party with whom he has accounted. Therefore finding nothing illegal in the items of the account, no breach of duty in the intestate, no compounding of the tolls in fraud of the act of parliament, but only giving credit for them to a future day; no collusive bargain in prejudice of the commissioners; and considering that the defendant, who has accounted with the plaintiff, has thereby recognized her title to receive the tolls on account of the intestate, I think the verdict ought to stand.

GROSE, J. was of the same opinion.

LE BLANC, J. I am glad that a medium of proof has been found to sustain the justice of the case. It was a question for the jury to decide, whether by the defendant's having received the account of the tolls, and making no objection to it, he did not recognize that so much was due from him on that account. But it is said, that there is a fundamental objection to the character in which the plaintiff sues; for that the intestate, not having been legally appointed collector, must be taken to have received the tolls merely as the servant of the trustees. But as neither the trustees nor the creditors of the turnpike make any objection to his title, shall it be permitted to a third person, after having treated with the intestate as a person legally entitled to receive the tolls, and having actually settled an account with him for the amount, shall it be permitted to such an one now to object to the plaintiff's recovery, not upon the special count, but upon the account stated? It has been also objected, that the tolls are not the subject of an action, but if refused, could only be levied by dis-

tres upon the carriage, &c. when passing. The act, however, only says that they shall not be compounded for; it does not say that credit shall not be given for them, where there is no collusion. Therefore, when the jury have found that the defendant has accounted with the plaintiff for these very tolls upon the footing of the intestate's title, he shall not be permitted now to dispute that title upon the count for the account stated.

BAYLEY, J. concurred.

Rule discharged.

Higham, and Elizabeth his Wife v. Ridgway.

10 East, 109. June 30, 1808.

If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death, if he could have been examined to it in his life time. And therefore an entry made by a man-midwife in a book of having delivered a woman of a child on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.

UPON error brought to reverse a recovery suffered by *Wm. Fowden*, the younger, of certain lands in the county palatine of *Chester*, of which he claimed to be first tenant in tail under indentures of the 16th and 17th of *December* 1763, it appeared that the premises were limited in remainder to the first son of the body of *Wm. Fowden*, the father, in tail, with remainder to the second and other sons in tail, remainder to the daughters in tail: under which last limitation the plaintiff *Elizabeth* claimed, in default of heirs male of *Wm. Fowden* the father, as heir of the body of *Mary*, his only daughter. The record set forth the recovery, which was of the Session at *Chester*, on the 16th of *April* 29 Geo. 3., and appeared to have been acknowledged at *Macclesfield* on the 15th of *April* 1780, and that an affidavit was sworn on that day by *Wm. Morley*, *Wm. Fowden*, sen., and *Mary* the wife of *John Orme*, in which *Wm. Fowden*, sen. swore "that *Wm. Fowden* the younger was born on the second of *April* 1768, but that being a protestant dissenter no entry was made of his baptism in any register." And *Mary Orme* swore that she was aunt to *Wm. Fowden* jun., and well remembered that he was born in the beginning of *April*, and before the 15th day of that month in the year 1768." And the error assigned was that it appeared in the record, &c. that *Wm. Fowden* jun., on *Friday* in the aforesaid Session at *Chester*, appeared by attorney and warranted the tenements, &c. to *E.* (the tenant), &c.: but that *Wm. Fowden* jun. was then an infant within the age of 21 years, viz. 20 years and no more. And on joinder in error, the issue was, "Whether *Wm. Fowden*, the younger, at the time of his appearance and warranty, and voucher to warranty, and also at the time of the giving of the said judgment (of recovery) was an infant within the age of 21 years, to wit, of the age of 20 years and no more."

At the trial at *Chester*, it appeared, that *Wm. Fowden* jun. died on the 31st of *December* 1792, having before made his will, and *Wm. Fowden* sen. the father, died on the 20th of *March* 1806: but *Mary Orme*, the aunt was still living, and examined as a witness by the defendant in support of the fact as sworn to in her affidavit; but the accuracy of her recollection as to the precise day of her nephew's birth was rendered doubtful by circumstances which came out upon cross-examination. And on the part of the plaintiffs, it was, amongst other things, proved by a neighbour that *Wm. Fowden*, the father, and his wife, lived at *Bramhall*, where *William*, the son was born: that it was on a *Friday*. That he was desired by the father to fetch *Mr. Hewitt*, the man-midwife, who lived at *Stockport*, about three miles and a half distant: the witness, however had occasion to go elsewhere, and another person was sent to *Mr. Hewitt*, and on the witness's return the same evening *Mrs. Fow-*

den was brought to bed of a son. That the wife of *Richard Fallows*, who lived half a mile off, was also delivered on the same day. The person who was sent to Mr. *Hewitt's* corroborated the account, and knew young *Fallows* and young *Fowden* as they grew up, who appeared about the same age. Another witness also proved the birth of young *Fowden* on a *Friday*, (the particular day of the week was proved by reference to market day and other collateral circumstances by the several witnesses), and that he saw Mr. *Hewitt* at *Fowden's* house. *Fallows*, the son, also proved his growing up with *Wm. Fowden*, the son; that they used to dispute which was the eldest: but they were both born on the same day; and he had been told this by *Fowden's* father and mother. His own birth-day was on the 22d of *April*. Other witnesses also deposed to the same effect. *John Hewitt* was then called, the son of the man-midwife who delivered Mrs. *Fowden*; and he proved the death of his father 20 years before, and produced certain books (on which the question of evidence arose) in which his father had been used to make regular entries of all matters relating to his business, with their dates, immediately on his return home: and the entries in question were proved to be his father's hand-writing. These entries were tendered in evidence to shew the precise day of the birth of *Wm. Fowden, jun.* The evidence was objected to; but the Court determined to receive it, reserving the point. The entries in question (which were preceded and followed in order of time by others of the like nature) were as follows.

" 22d April 1768.

38(a). *Richard Fallows's* wife. *Bramhall*. Filius circa hor, 9, matutin: cum forcipe, &c.
Paid."

Then followed in the same page the entry in question, without any intervening date.

" — *Wm. Fowden, junr's*(b) wife.
filius circa hor. 3 post merid. nat. &c."

79(c).

" *Wm. Fowden, junr.* 1768.

Aprilis 22. Filius natus, &c.

wife	—	—	—	—	1	6	1
26th. <i>Haustus</i> purg.	—	—	—	—	0	16	0
					2	1	1

Pd. 25th OcXtr. 1768.

The jury found, on this evidence, that *Wm. Fowden jun.* who suffered the recovery, was not born on the 2d, but on the 22d of *April* 1768.

Topping and *Yates* shewed cause against a rule for a new trial and contended that the entries in question, proved to be in the hand-writing of the man-midwife, and to have been regularly made from time to time in the course of his business, were evidence of the time of the birth of *Wm. Fowden* the son, as having been made by a person possessing a competent knowledge of the fact, and discharging the party on whom he had a claim in the first instance for his medical attendance. Similar evidence has been admitted in other cases. In *Warren d. Webb v. Greenville*, 2 Stra. 1129, the question was, Whether there had been a surrender of part of the estate, which was in jointure to the widow

(a) The figures 38 referred to the ledger.

(b) This was the designation at that time of the father of the *William Fowden, jun.* in question.

(c) These figures referred to the ledger, the entry in which follows.

at the time of the recovery suffered by the son tenant in tail; without which there was no good tenant to the *præcipe* for that part, and the recovery was ineffectual for so much. It was insisted, that a surrender should be presumed at that distance of time (a); and to fortify that presumption the debt-book of the family attorney, who was dead, was produced, wherein he charged so much for suffering the recovery, including several items for drawing and engrossing the mother's surrender: all which charges appeared by the book to have been paid. And this was held to be good evidence after the death of the attorney, who, if living, might have been examined to the fact. This report of the case is in the main confirmed, as to this point, by Lord Mansfield, in *Goodtitle d. Brydges v. The Duke of Chandos*, 2 Burr. 1071, 2; with this addition, that a receipt had been given upon the bill, which contained the articles, for drawing and engrossing the surrender: Though Lord Mansfield seems to have thought that Sir John Strange had not laid sufficient stress in his report upon the presumption arising from length of time. So rentals or stewards' accounts, with payments marked on them, are always received in evidence (b) even against third persons. In *Herbert v. Tuckal*, T. Ray. 84, upon a question, whether one was of full age when he made his will, an entry made by his father in an almanack of the day of his son's birth was allowed by the Court, on a trial at bar, to be strong evidence: and yet that was no question of pedigree, and therefore not within the exception which allows the hearsay declarations of the family to be evidence in such cases, any more than the declaration of a father as to the place of his son's birth; which was rejected as evidence in *The King v. The Inhabitants of Erith*, 8 East, 539.

Manley, Serjt. and *John Williams*, contra. The question, whether these entries be evidence, cannot depend on their apparent accuracy, but on this, whether the declarations of a third person, by parol or in writing, as to a fact, which may be supposed to have been within his knowledge at the time, can, after his death, be given in evidence, merely because in the same breath or writing, he admitted that a claim of his own respecting such fact, if true, had been discharged. Ever since the case of *The King v. Eriswell* (c), it has been considered that hearsay is not evidence of a particular fact, except in proof of a pedigree: and that exception has always been confined to the strict fact in issue of descent or primogeniture in proof of pedigree; and has always been rejected in collateral inquiries; as of the place of birth, upon a question of settlement, in *The King v. Erith*. And perhaps the case of *Herbert v. Tuckal*, which might have been a question between the heir at law and devisee, may have passed as a question of pedigree, without adverting to this distinction. Now here the precise fact in issue was, "Whether *Wm. Fowden*, the younger, at the time of his appearance and warranty, &c. was an infant within the age of 21 years?" &c. in which no question of pedigree is involved. But not even in questions of pedigree have the declarations of any others than members of the family been received in evidence; and the evidence given here was of the declaration of a stranger; for such the apothecary must be taken to be. The admissibility, therefore of the evidence stands wholly upon the ground that the entry made by him, taken altogether, discharged his own claim. All the cases on this head rest upon the original authority of *Warren d. Webb v. Greenville*, 2 Stra. 1129, which by the explanation afterwards given of it by Lord Mansfield, in *Goodtitle v. Duke of Chandos*, 2 Burr. 1072, turned mainly upon the presumption of the surrender arising from lapse of time; and his very solicitude to explain this shews that he was not so well satisfied of the admissibility of the entries in the attorney's bill book, which, he says, was strongly litigated: and he concludes his observations by saying, that Sir

(a) The trial was in 1740.

(b) 12 Vin. Abr. 90. tit. Evidence, pl. 13 and 14. *Barry v. Bebbington*, 4 Term Rep. 514, and *Stead v. Heaton*, ib. 669.

(c) 3 Term Rep. 707, (and see *Rez v. Ferryfrystone*, 2 East, 54, where the question was finally set at rest.

J. Strange's report is incorrect. Both in *Barry v. Bebbington*, 4 Term Rep. 514, and in *Stead v. Heaton*, 1b. 669, the persons whose entries were given in evidence had in the first instance charged themselves with the receipt of money, for which they were accountable to others, to whom their accounts were delivered: but where the entries of the receipt of rent had been made by the owner of the estate himself, as in *Outram v. Morewood*, 5 Term Rep. 121, they were held not to be evidence even to prove the identity of the land in a cause between other persons. And on the same principle Lord *Kenyon*, in the case of *Calvert v. The Archbishop of Canterbury*, 2 Esp. N. P. Cas. 646, ruled, that an entry of an agreement for a pair of horses, made in the plaintiff's books by his servant, who was dead, was not evidence to charge the defendant for the hire of them, because the servant did not thereby charge himself. So this, being an entry made merely for the party's own use, must be considered as *res inter alios acta*. The case of *Roe d. Brune v. Rawlings*, 7 East, 279, went on different ground; for there the letter written by a former steward of the estate to the then tenant for life, containing a particular of the ancient rents, &c. was by him handed down amongst the muniments of the estate to the succeeding tenant for life, and preserved by each *against his own interest*, as an authentic document: and on this ground it was held to be evidence of the ancient rent against the lessee of the last tenant for life, by whose acknowledgment of the fact such lessee was bound. They also noticed, that the apothecary's discharge of his demand was not made upon the entry as to the time of the child's birth, but only in the ledger to which the entry referred. And they observed upon the dangerous consequence of introducing a laxity in the rules of evidence by extending the exceptions of hearsay evidence of particular facts beyond the strict question of pedigree, and that class of cases where entries had been made by stewards and such like, to charge themselves in account with the payment over of sums they had received in right of others, to whom those accounts were delivered.

Lord ELLENBOROUGH, C. J. I should be extremely sorry if any thing fell from the Court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property: but in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognised, beginning with that of *Warren v. Greenville*. The question is, Whether the books of a man-midwife, attending upon a woman at the time of her delivery, and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries? That the books would be evidence in themselves, as recording this event of the birth and other similar events in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion in this case formed with reference to the declarations of parents, &c. received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers' books have been admitted; namely, that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case, the party repelled by his entry a claim which he would otherwise have had upon the other for work performed, and medicines furnished to the wife: and the period of her delivery is the time for which the former charge is made; the date of which is the 22d of April, when, it appears by other evidence, that the man-midwife was in fact attending at the house of *Wm. Fowden*. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him, that his claim was satisfied. It is idle to say, that the word *paid* only shall be admitted in evidence without the context, which

explains to what it refers ; we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry, of which it is explanatory. So far, therefore, the case of *Warren v. Greenville*, if it be law, is an authority in point to the present case. But it is supposed, that after the evidence of the solicitor's book there had been received, the Court had repented of their decision, and put the case to the jury entirely on the presumption of a surrender from length of time. But how does that appear, either upon the report in *Strange*, or by what fell from Lord *Mansfield* in the case in *Burrow*. *Warren v. Greenville* was decided in the year 1740, about 40 years after, the time when it was insisted that the surrender should be presumed to have been made. And to fortify that presumption, the report says, that the defendant offered the attorney's debt-book in evidence, containing charges for drawing and engrossing the surrender, which it appeared by the book were paid. This evidence was objected to, but allowed by the Court, who thought it material, upon the inquiry into the reasonableness of presuming a surrender, and not to be suspected to be done for this purpose. The entries were read accordingly. But the Court afterwards declared " that without that circumstance they would have presumed a surrender ; and desired it might be noticed that they did not require any evidence to fortify the presumption after such a length of time." Now, what is the fair inference to be collected from that report ? not that the Court doubted at all whether the evidence of the entries in the book had been properly received : but that they were afraid that by fortifying and buttressing up, by this further evidence, a presumption so strong from the mere lapse of time they might be supposed to have weakened that presumption ; which they wished to guard against. And this is in substance the account which Lord *Mansfield* himself gives of that decision in the case in *Burrow*. But he also states that the point of evidence was strongly litigated : which shews that it did not pass without much discussion and consideration : and his account of the fact there given in evidence, so far from shewing the report to be incorrect, is a strong confirmation of it in the material circumstance. Here it appears distinctly from other evidence that there was the work done for which the charge was made : for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered : and the discharge in the book, in his own hand-writing, repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way, not to discharge a claim which it appears from other evidence that he had. The evidence, therefore, in this case was properly received, as well upon the authority of the case of *Warren v. Greenville* as upon principle.

GROSE, J. General rules of evidence are of the greatest consequence ; for either admitting evidence of a fact when it should be excluded, or rejecting it when it ought to be admitted, would shake the security of all property. The right decision, therefore, of every case of this sort is of great importance. But it is very difficult sometimes to distinguish the nice shades of difference between cases of this description ; and therefore I am always glad to find an express authority on which I can set my foot. The case of *Warren d. Webb v. Greenville* is of that sort which ought not now to be called in doubt, having been confirmed in the subsequent case by Lord *Mansfield*, and since that again by this Court. Relying, therefore, upon that authority, which applies most strongly to this case, I think the evidence was rightly admitted. And even without the entries, I think there was evidence sufficient to find the verdict which has been given, though those entries put the matter out of all question.

LE BLANC, J. On inquiring into the truth of facts which happened a long time ago, the Courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility by lapse of time of proving those facts in the ordinary way by living witnesses. On this ground, hearsay and reputation (which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact handed down from one to another,) have been admitted as evidence in particular cases. On that principle stands the evidence in cases of pedigree, of declarations of the family who are dead, or of monumental inscriptions, or of entries made by them in family bibles. The like evidence has been admitted in other cases, where the Court were satisfied that the person whose written entry or hearsay was offered in evidence had no interest in falsifying the fact, but on the contrary had an interest against his declaration or written entry; as in the case of receiver's books. I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person: it is not necessary now to determine that question; but I would not be bound at present to say that they are not in evidence. But here the entries were made by a person who, so far from having any interest to make them, had an interest the other way; and such entries against the interest of the party making them are clearly evidence of the fact stated, on the authority of the case of *Warren v. Greenville*, and of all those cases where the books of receivers have been admitted. I understand the expressions used by Sir John Strange, in his report of that case, very differently from what they have been argued to mean. There was a presumption there of a surrender from the circumstances of the case, and from length of time; and besides that presumption so arising, there was a confirmation of it by the entry in question. The Court only said, that there was sufficient to presume the surrender, without the evidence of the entry; but not that they had any doubt that the entry was evidence. And this account of it is, I think, confirmed by Lord Mansfield in the case in *Burrow*; who says, that the point was much debated, and explains the observation made by Sir John Strange at the conclusion of his report. Then I cannot distinguish this from the case of *Warren v. Greenville*, nor from those of receivers' accounts, nor from *Roe d. Brune v. Rawlins*. The reasons given for admitting the evidence in the latter case apply also to the present, though I think in a much stronger degree. And I cannot agree to distinguish the entry from the ledger in favour of the objection; for in the ledger, in which *Hewitt* discharges his claim, the date is mentioned; but at any rate that is not weakened by its correspondence with the other entry.

BAYLEY, J. This was no officious entry made by one who had no concern in the transaction: he had no interest in making it: and as he thereby discharged an individual against whom he would otherwise have had a claim, I think the entry was evidence by all the authorities. There were two entries read, the one following the other, without any intervening date; the first of these, relating to *Fallows*, is dated the 22d of April 1768; and this is marked as paid: the next, as to *Fowden*, is not stated there to be paid; but it refers to a particular page in the ledger, where the charge against *Fowden* is made, including items, one of which is for delivering his wife, corresponding in date with the former entry; and there he states himself to have been paid for his work and medicines. Therefore, if he had brought an action for his work, and had received notice to produce his books, this entry would have discharged the father. Now, all the cases agree, that a written entry, by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself, there being no interest of his own to advance by such entry. In *Outram v. Morewood* the entry made was for the party's own interest who made it; for he en-

tered the receipt of rent from another person ; therefore, if that had been evidence for him, or for those claiming under him, it would have been furnishing evidence for himself of a right to the estate. But the principle to be drawn from all the cases, beginning with *Warren v. Greenville* down to *Roe v. Rawlins*, is that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime. And that principle has been constantly acted upon in the case of receivers' accounts.

Rule discharged.

Horwood and Another, Executors of Coare v. Underhill.

10 East, 122. July 1, 1808.

The grantor of an annuity and his sureties having given their joint and several bond, whereby they bound themselves, their *heirs*, executors, and administrators, to secure the annuity, a memorial stating generally, that they became bound to the grantee, &c., though it may be good, without stating that they became jointly and severally bound, as not being inconsistent with the extent of their obligation; yet is bad, for the omission of stating the extent of the security in respect to their *heirs*; these not being bound as personal representatives are, without being named.

IN debt on bond, made to the testator on the 24th of December 1796, for 2600*l.* the bond and condition were set out upon oyer, by which it appeared, that the defendant and others jointly and severally bound themselves, and their, and each of their "*heirs*, executors, and administrators," in the penal sum of 2600*l.*, conditioned to secure to the testator an annuity of 15*l.* 1*l.* 1*d.* during the life of the longest liver of the obligors, in consideration of 1400*l.* to them paid: and then the defendant pleaded, amongst other pleas, 2*dly*, That no memorial of the bond was inrolled in Chancery, pursuant to the stat. 17 Geo. 3. c. 26. 2*dly*, That a memorial of the bond was inrolled by the testator on the 7th of January 1797, which memorial was set out in the plea, wherein it is only stated, that the obligors became bound to the testator in 2600*l.*, conditioned for payment by them, or any of them, or any of their *heirs*, executors, or administrators to the testator, of the annuity, &c. without stating that they bound themselves "*jointly and severally*, and their and each of their *heirs*, executors, and administrators:" and that no other memorial of the bond was inrolled. The same question was raised by the 15th plea, which stated that the defendant ought not to be charged, &c. because for better securing the annuity in the condition of the bond in suit mentioned, *P. Giblett*, by his bond of the same date, became bound to the testator in 2600*l.*, for which he bound himself, "his *heirs*, executors, and administrators;" and that the testator caused a memorial of that bond to be inrolled; which does not state that *P. G.* thereby bound his "*heirs*, executors, or administrators." The replication to the 2*d* plea alleged, that a memorial of the bond, such as is set forth in the 3*d* plea, was inrolled in time, pursuant to the statute: and demurred generally to the 3*d* and 15th pleas. And the defendant by his rejoinder demurred generally to the replication to the 2*d* plea.

Holroyd, for the plaintiff, after observing that this case arose out of the same transaction and securities, which had come before the Court in *Coare v. Giblett*,^(a) contended, 1*st*, that it was no objection to the memorial, that it only stated that the obligors became bound to the testator, when it appeared that they were jointly and severally bound; for stating that they were bound, generally, does not exclude the fact of their being jointly and severally bound. Nor was this held to be any objection in the former case; for the Court there were of opinion, that taking the whole of the memorial together,

(a) 3 East, 461, and again in 4 East, 85.

though it was at first stated generally, as here ; yet it appeared by the recital of a subsequent bond in the memorial, that the bond in question was a joint and several bond ; and therefore there was no inconsistency, nor any untrue statement in that memorial ; as in another case there cited of *Willey v. Cawthorne*, 1 East, 398, where the memorial having stated that the obligors were *severally* bound, whereas they were bound *jointly* as well as *severally*, the variance was held to be fatal. The annuity act, 17 Geo. 3. c. 26, does not require this particularity. [*Knox*, contra, said he did not mean to insist on this objection ; to which *The Court* assented.] Then, 2dly, It was not necessary to state in the memorial that the obligor bound his *heirs* as well as himself. It certainly was not necessary to state that he bound his *executors and administrators* ; because having bound himself, the law would of course bind them. And though *heirs* would not be bound unless named ; yet the annuity act does not require that they should be named. The first clause only requires that the memorial shall contain the date of the bond, &c. and the name of all the *parties*, &c. ; which could not be meant to include *heirs*, as these must be uncertain at the time ; but must be intended of the grantors and grantees, &c. [*Lord Ellenborough*, C. J. The defendant's argument will be, that this is an improper description of the instrument assuring the annuity.] The act sets forth the particular parts of the instrument, which it requires to be stated, in which *heirs* are not included, unless they fall under the description of *parties*. Many of the objections taken in *O'Callaghan and Ingilby*, 9 East, 135, and *Mouys v. Leake*, 5 Term Rep. 411, were answered by the Court saying that the act did not require the several matters suggested to be inserted in the memorial, though certainly forming parts of the description of the instrument. And where objections of this sort have prevailed in other cases, they have been where trusts, omitted, qualified and altered those which were stated in the memorial.

Knox, contra. The object of the annuity act was to require the real transaction between the parties to be stated in substance in the memorial ; which has not been done here. The not naming the *executors and administrators* of the obligor, though not a literal, is yet a substantial compliance with the act, because the law binds them ; but the *heir* not being bound, unless expressly named, *Crosseing v. Honor*, 1 Vern. 180, and though in fact named, not being noticed in the memorial ; the real transaction is not expressed : the true consideration does not appear in the memorial, because it states a security of less value than that which was bargained for. The heir, when named, qua *heir*, is a *party*, though the person may not be known at the time ; but that is not necessary, because it is in his quality of *heir* only, that he can thereafter be liable. In *Hart v. Lovelace*, 5 Term Rep. 417, it was held not enough to state that *all* the instruments were attested by *A., B., C., &c. or one of them* ; without shewing the names of the respective witnesses to the respective instruments. And in *Willey v. Cawthorne*, 1 East, 400, *Lord Kenyon*, in reasoning on the objection which there prevailed, namely, that the obligors were only stated to be *severally*, instead of *jointly* and *severally* bound, "the memorial does not truly describe the security as to the extent of it : " and the omission of the remedy here against the heirs is more important than the slip in that case.

Holroyd, in reply, was asked by *Lord Ellenborough* what he meant to argue would be a sufficient description of a bond ; whether it would be sufficient to say that a bond of such a date was given by the party : whether it can be said to be a sufficient description of it, unless it be stated who are bound ? To which he answered, that the *obligor* is, properly speaking, the only person who is *bound* : the *heir*, though named, is only bound in respect of real assets by descent : it is the *property*, therefore, and not the *person* of the heir which is bound. But it is sufficient that the act does not require this to be stated : nor is there any reason for extending the words of it in this in-

stance ; because no information is conveyed, which would not be presumed without it.

LORD ELLENBOROUGH, C. J. If this were *res integra*, I should have great doubt whether full effect ought not to be given to Mr. *Holroyd's* argument, that it is sufficient to state in the memorial those things only which the act of parliament expressly requires : but we are now called upon to decide this case after a series of decisions have imposed a line of construction upon us, which, with security to other parties, whose rights have been thereby affected, we cannot safely recede from. The act requires that a memorial of every bond, &c. should be inrolled ; what then will satisfy those words ? Unless they have some meaning, it would not be necessary to set forth the penalty of the bond, whether it created a charge of 100*l.* or of 1000*l.* ; for the act does not proceed to make mention of the penalty amongst the enumerated circumstances expressly required to be stated. If then the memorial must contain a description of the several instruments assuring the annuity beyond the express letter of the act, as the cases upon it have in several instances decided, it seems also material to state who are bound by the bond, and whether the obligor has bound his *heirs*, who can only be bound if named : and if they be named in the bond and not in the memorial, how can the memorial be said to describe truly the *extent of the security* ; which was considered to be necessary by Lord *Kenyon* in the case of *Willey v. Cawthorne*. And it is not sufficient to say that the effect of such a bond is to bind the *property* of the obligor in the hands of the heir, and not the *person* of the heir ; for the heir himself is bound in respect of the property. Nor can I adopt the argument that it was unnecessary for the memorial to state this, because of the probability that the heirs should be bound. For if the extent of the security be required to be stated, it ought not to be left to conjecture, however probable. Founding myself, therefore, rather upon the authorities construing this act, than upon the more literal construction which I should have been inclined to put upon it in the first instance, I think this memorial is defective for want of stating that the *heirs* of the obligors were bound by their bond.

LE BLANC, J.(a). The only question now made arises on the memorial stating that the obligors *became bound*, without stating that they bound their *heirs*, executors, &c. And this omission affects as well the bond of the principal as of the sureties. The other objection as to its being only stated that they *became bound*, generally, without stating that they were *jointly and severally bound*, has been properly given up, after the case of *Coare v. Giblett*. With respect to the principal objection, it is said to be only necessary to inrol a security or assurance for an annuity in those particulars which are expressly required by the act. But that is certainly too limited a construction ; because it would not then be necessary, as it is not expressly required by the act, to describe the extent of the security or assurance, whether for a greater or less amount ; and yet that must have been intended. By the same rule, it would be sufficient to state the bond, without stating the condition of it, if it had one ; though the extent of the security would depend mainly upon that. And so there is a great difference, as to the extent of the security, whether or not the obligor bound his heirs. In the case of *Mourys v. Leake and Jones*, which has been insisted on, *Leake*, the grantor of the annuity, had given the security of a rent-charge out of his benefice, and had also covenanted to pay the annuity ; and *Jones*, the surety, had also given his personal covenant to pay the annuity on *Leake's* default ; and the memorial had stated the covenant by *Jones*, but not the personal covenant of *Leake* : and Lord *Kenyon* held it sufficient to state *Leake* as the grantor of the annuity, without stating his covenant to pay it ; because it was not necessary to state all the covenants in a deed, unless they modified the grant itself. That authority, therefore, will

(a) *Gross*, J. was absent.

not help the argument. But the case which principally bears upon this is *Willey v. Cawthorne*, where a *joint and several* bond was stated in the memorial as a *several* bond only, which was held ill: and both Lord *Kenyon* and Mr. Justice *Lawrence* considered, that the extent of the security, and the nature of the remedy, which the grantee would have to recover the annuity, were material to be stated truly; and that as the security and the remedy were different in the case of a joint and of a several bond, the statement given of the extent of the security in the memorial was not correct. So here, it makes a great difference whether the security be given in such a form a will bind the obligor, in respect of his real property, during his life only, or whether it would extend to bind his heirs after his decease to the whole extent of it; and it is not correct to state the security as binding him only and his personal representatives, when in truth it is more extensive.

BAYLEY, J. having been before concerned as counsel in the cause, declined giving any opinion upon it.

Judgment for the Defendant.

The Mayor, &c. of Congleton v. Pattison and Another.

10 East, 180. July 1, 1808.

In a lease of ground, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, &c. and assigns, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate: held that this covenant did not run with the land, or bind the assignee of the lessee.

THE plaintiffs declared in covenant upon an indenture, made the 23d November, 1752, whereby they demised to *John Clayton* a piece of ground in *Congleton* called the *Byflat*, and a certain *strip* of land, through which a water-course was intended to be made, with liberty for making and repairing the same, and with liberty for *Clayton*, his executors, administrators, or assigns, to erect in the *Byflat* a silk mill, &c. *habendum*, the said piece of ground and premises, &c. to *Clayton*, his executors, administrators, and assigns, for 300 years from the date of the indenture; yielding and paying, as therein mentioned. And *Clayton* covenanted for himself, his executors, administrators, and assigns, with the corporation, that he, his executors, &c. would at all times during the term, before any person should be received as servants, workmen, or apprentices, in such silk mill, give notice of their names to the town clerk of the borough for the time being; and if he should immediately give satisfactory information to *Clayton*, his executors, &c. or to the then owner or occupier of the silk mill, that any of the persons in such notice were legally settled in any other parish, or township, and not in *Congleton*, then they should not be received to work in the business of such silk mill, before a certificate of the settlement of such person under the stat. 8 and 9 W. 3. c. 30, should be given to *Congleton*. The declaration then stated the entry of *J. Clayton*, and the building of the silk mill; and that on the 1st of January, 1790, all the estate and interest, &c. of *J. Clayton* in the premises duly came to and vested in the defendants by assignment, by virtue of which they entered and were possessed, &c.: and then assigned as a breach, that after the defendants became so possessed, and while they were working the silk mill, and during the continuance of the term, they received divers persons as servants, workmen and apprentices to work in the said mill, without giving the previous notice before mentioned to the town-clerk of *Congleton*, and that the persons so received worked in the said mill without any such notice, and that they had not previously gained any settlement in *Congleton*; by reason of which the township of *Congleton* had become liable to relieve them and their families, and had expended a large sum, in the same, and continued liable to the burden,

&c. ; and that the plaintiffs had also incurred great expense in the premises, and their estates and property in the township had been lessened in value.

The defendants, after cravingoyer of the indenture, by which it appeared further, that the term was granted by the corporation in consideration of 80*l.* paid, and of a nominal yearly rent; demurred generally to the declaration.

Littledale, in support of the demurrer, argued that this was not a covenant which run with the land, and therefore could not bind the defendants as assignees of the term. To make a covenant run with the land it must appear that the performance or non-performance of it will affect the thing demised: but this is a collateral covenant not to introduce foreign poor into the township, and does not at all affect the working of the mill or the premises demised. Neither can it affect the corporation as the reversioner; for if any additional burden were brought upon the township by such new settled inhabitants, the lessee or occupiers must bear it. The covenant amounts to no more than an undertaking to indemnify the landlord from the expence of foreign poor; and is the same as if the lessee had covenanted to pay so much annually to the churchwardens and overseers for the use of the poor; which in *Mayo v. Buckhurst*, Cro. Jac. 438, was held to be a collateral personal covenant. It does not appear but that at the end of the term the number of poor persons in *Congleton* may be diminished, notwithstanding a temporary increase for the present; or supposing the population there should then be greater; yet there may be a corresponding increase in the value of the lands, from the greater demand for the produce. Besides which, the question is blended with the general policy of the country, which may be affected by stipulations not to employ labourers out of other districts. *Spencer's case*, 5 Rep. 16, lays down the distinction between collateral covenants and such as run with the land: the latter must be such as affect the demised land itself, and not merely the collateral interest of the lessor; and this was recognized in *Bally v. Wells*, 3 Wils. 25, and *Wilmot's Rep.* 341; though there the covenant by a lessee of tithes, not to let any of the farmers of the parish have any part of the tithes, was held to run with the tithes and bind the assignee. In *Tatem v. Chaplin*, 2 H. Blac. 133, a covenant by the lessee, to reside constantly on the demised premises, was held to bind the assignee, though not named: but that affected the mode of occupying the land. And in *Brewster v. Kitchen*, *Ld. Ray.* 322, Lord *Holt* held, that a covenant by tenant in fee, who granted a rent charge out of lands, to pay it without reduction, for himself and his heirs, would not bind his assignee. So Co. Litt. 215 b. commenting on the stat. 32 H. 8. c. 34. enabling grantees of reversions to re-enter on condition broken by non-payment of rent, doing waste, or other forfeiture, confines it to such conditions as are incident to the reversion, as rent, reparations, &c. and not for the payment of any sum in gross.

Richardson, contra. The quantum of interest cannot vary the question, if the covenant in any respect affect the land. Neither is it material to enquire whether the breach of the covenant will affect the lord's interest at the present period, if it may affect the land at the end of the term. [Lord *Ellenborough*, C. J. Can we see with certainty that the increase of population in the township at the end of the term, supposing that to be the consequence of the defendant's acts, will prejudice the land, or affect the value of the reversion? It might affect immediately other lands of the corporation in the township; but it could not affect the interest of the corporation in these lands during the term.] There is no certainty of that effect being produced, but there is a reasonable probability of it; and the parties themselves have so considered it on the face of the deed. There is no certainty of prejudice to a landlord by breach of many husbandry covenants during the term; but if the parties stipulate for their performance upon the presumption that prejudice may ensue from the breach of them, that is sufficient to sustain the action. The case of *Bally v.*

Wells, 3 Wils. 25, cited; shews that the prejudice to the reversioner need not be certain, and that it need not arise during the term. [Lord *Ellenborough*, C. J. There the covenant affected the very thing demised in the manner in which it was to be used: the breach of it had a proximate tendency to produce an effect permanently injurious to the landlord's estate. But it cannot immediately affect the thing demised, whether the mill is to be worked by persons of this or any other parish. Suppose the covenant had been only to employ freemen of the corporation in the mill, would that have run with the land as affecting the thing demised? The covenant may be said to regulate the mode of enjoyment of the thing demised. By throwing a greater burden of poor upon the lessee or occupier in respect to the land, it may render him less able to pay his rent. But the injury to the reversioner during the term is not the principle on which these cases have proceeded. In *London*; and other great towns, it is a common restriction in leases that the occupiers shall not carry on their particular trades, which would certainly bind an assignee: and yet it cannot be said to be any immediate prejudice to the property during the term, or even afterwards in many instances: on the contrary, it might render the estate more valuable to the landlord in point of future rent.

Littledale, in reply, with respect to covenants against exercising particular trades on the demised premises, they may run with the land, because they prescribe a particular mode of enjoying it; and if the appearance of the premises were any way altered for the purpose, it would be waste, as altering the evidence of identity of the thing demised. The same answer will apply to covenants regulating the course of husbandry. The term may end before the land is restored to its original or covenanted state, or the influence of the change may continue after the appearance of it is done away. But the covenant here cannot affect the state, condition, or occupation of the land, even during the term; and it cannot be told whether, at the end of the term, there may be more poor or an increased rate, or, if increased, that there will not be a proportionable increase in the value of the land, from the very circumstance of an increased population.

LORD ELLENBOROUGH, C. J. This is a covenant in which the assignee is specifically named; and though it were for a thing not *in esse* at the time, yet being specifically named, it would bind him, if it affected the nature, quality or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it. But this covenant does not affect the thing demised, in the one way or the other. It may indeed collaterally affect the lessors as to other lands they may have in possession in the same parish, by increasing the poor's rate upon them; but it cannot affect them even collaterally in respect of the demised premises during the term. How then can it affect the nature, quality, or value of the thing demised? Can it make any difference to the mills, whether they are worked by persons of one parish or another: or can it affect the value of the thing at the end of the term, independently of collateral circumstances? The settling an additional number of persons in this place may indeed, by means of the increased population, bring an increased burden at the end of the term on those who are to pay the rates: but that increase of population may also be an increased benefit to the land owners, as it has happened within our own experience in many parts of this kingdom, the seats of manufactures, where the value of land has, in consequence, risen in a great proportion. But the covenant in question does not affect the thing demised immediately, but only, if at all, in respect of collateral circumstances; that is through the medium of an increased population, and the increased expence of providing for them on the one hand, with the increased value of the lands to be set against it on the other hand. How then does it affect the mode of occupation? The carrying on of a particular trade on the premises may be said to do that; but where the work to be done is at all events the same, whether it be done by workmen from one parish or another.

er, cannot affect the mode of occupation. The covenant, therefore, not directly affecting the nature, quality, or value of the thing demised, nor the mode of occupying it, is a collateral covenant, which will not bind the assignee of the term, though named; and this is a question with the assignee, and not with the original lessee who entered into the covenant. In the case of *Bally v. Wells* the covenant might affect the thing demised; for if the lessee of the tithes suffered any of the farmers of the parish to take their own tithes, such union of the land with the tithe might lay a foundation for claiming a *modus*, which might affect the future value of the tithes, and would immediately affect the occupation. But we cannot say that this covenant does either: and therefore it does not run with the land so as to bind the assignees.

LE BLANC, J. (a). This covenant does not appear to me to run with the land, or bind the assignee. The question does not depend upon the length of the lease, or whether the injury to the lessor is to take effect in more or less time, but whether the thing covenanted to be done or not to be done immediately affects the land itself, or the mode of occupying it. But here it is only by collateral circumstances that this can make the land more or less valuable. It can no otherwise affect the land than as by introducing a greater number of persons into the parish who were not before settled there, and by enabling them to gain settlements, it may by possibility hereafter create a greater number of poor, who must be maintained by the occupiers, and so affect them: but this cannot be said to affect the land itself, or the mode of cultivating or occupying it. It is no more than if the lessee had covenanted that he would not employ such persons in any other house within the parish during his occupation of the premises in question. The work done is the same, whether by one set of servants or another: the nature of the property is not varied by it; but to employ persons in the mill who were not before settled inhabitants of *Congleton* may create a speculation whether it will affect the interests of the occupiers there. The ground, however, on which I distinguish this case from others is, that this is not a covenant which affects the land itself, or the mode of its occupation.

BATLEY, J. I agree that it is not material to consider how soon the act done, which was covenanted not to be done, may affect the land: but in order to bind the assignee the covenant must either affect the land itself during the term, such as those which regard the mode of occupation; or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land at the end of the term. Covenants to restrain the exercise of particular trades in houses fall within the first class: they affect the mode in which property is to be enjoyed during the term. The case in *Wilson* may rank under the second class; for if the lessee or a stranger were in the actual occupation of the tithes during the term, the evidence of the lessor's right to them would be continued, and therefore the estate of the reversioner would be better at the end of the term. But here the state of the premises will be the same at the end of the term, whether the parish be more or less burdened with poor. I agree that the value of the reversion will not be so much if the poor's rate on the land be increased; but that burden would be increased by a collateral circumstance; and where the value of the reversion is only altered by collateral circumstances, the covenant will not bind the assignee of the land. As in the instance put of a covenant not to employ foreigners in any other mill in the parish: and yet the value of the reversion would be affected in the same manner in the one instance as in the other. Suppose a covenant by the lessee to make a communication by water from the demised premises through other person's lands to another place to facilitate the access to a market, the value of the reversion would be materially affected by the non-performance of such a covenant; but it could not bind the assignee, because all the

(a) GROSE, J. was absent.

cases shew that the assignee is not bound unless the thing to be done is upon the land demised. Therefore, as this covenant does not affect the occupation of the land, nor alter the actual state of the property from what it would otherwise be at the end of the term, it does not bind the assignee(1)(2).

Judgment for the Defendant.

Buckley v. Kenyon.

10 East, 189. July 1, 1808.

In covenant on an indenture of demise of a coal mine, made on the 8th of July 1805, reserving 1-4th of the coal raised, or the value in money, at the election of the lessor; and if the 1-4th fell short of 400*l.* per annum, then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions: held that the lessor having elected to take the whole in money may declare for two years and three months' rent in arrear. But even if the money-rent were reserved annually, the plaintiff may remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the 1-4th or the value in money, &c. but had refused, &c. held that it would not hurt on general demurrer, that the count went on to allege, that before the exhibiting of the plaintiff's bill, viz. on the 1st of November, 1797, 900*l.* of the rent reserved for two years and three months was due and in arrear: for that date being before the lease made, and therefore impossible in respect to the subject-matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill 900*l.* of the rent reserved, &c. was due, is sufficient.

THE plaintiff declared in covenant upon an indenture of demise made on the 8th of July 1805, by J. Buckley (from whom he derived title) to the defendant and others; whereby he demised to them certain mines of coal *habendum* for 21 years from the 25th of December 1802, yielding and paying to J. B. his heirs and assigns, during the term, 1-4th of the coal raised, &c. or the value in money, at the election of the lessor, &c. But if the 1-4th, &c. fell short of the annual value of 400*l.* then yielding such additional rent as would make up that annual sum, to be rendered on the first day of every month in each year of the term demised by equal portions. Then followed a general covenant by the lessees for payment of the rent. The declaration then stated the death of J. B.; the descent of the reversion to the plaintiff; that he afterwards elected to be paid his rent in money, &c.; and that during the term, &c. to wit, on the 24th of August 1805, and on divers other days in each month between that day and the day of exhibiting the plaintiff's bill, the lessees raised 50,000 baskets of coal, the annual value of which did not amount to 400*l.* And then assigned as a breach that the lessees had not yielded and paid to the plaintiff on the first day of every month since the death of J. B. the 1-4th, &c. or the value, &c. or the difference between the

(1) For American cases as to what covenants run with the land, and bind the assignee, see *Pollard v. Shaffer*, 1 Dal. 210. 211. *Nesbit v. Nesbit & al.* Cam. & Nor. 818, 824. 8: C. Tayl. 82, 86. As to where the original covenantee, and not his assignee, shall have a right of action for a breach of covenant, see *Bickford v. Page*, 2 Mass. Rep. 455. *Lot v. Thomas*, Penn. 407. In the former case, (p. 460.) the general rule is thus laid down by Chief Justice PARSONS: That when a feoffment or demise is made of land, with covenants that run with the land, if the feoffee or lessee assign the land before the covenants are broken, and afterwards they are broken, the assignee only can bring an action of covenant to recover damages, unless the nature of the assignment be such that the assignor is holden to indemnify the assignee against a breach of the covenants by the feoffor or lessor. But in the case referred to the covenant being that the feoffor had good right to convey the premises in fee-simple, when in fact he had no such right, it was held, that this covenant was broken immediately on executing the deed, and did not pass with the land to the assignee.

(2) [See, among others, the following American cases on the subject of covenants running with the land. *Wheelock v. Thayer*, 16 Pick. 68. *Thomas v. Vonkayff*, 6 Gill. & Johns. 372. *Sayden v. Jones*, 10 Wend. 180. *Mitchell v. Warner*, 5 Conn. 497. *Kershaw v. Suples*, 1 R. 131. *Hunt v. Amidon*, 4 Hill. 345.—W.]

amount, &c. and 400*l.* *per annum*, but had neglected and refused so to do; and that before the exhibiting of this bill, to wit, *on the first of November 1797*, 900*l.* of the rent reserved for *two years and three months*, at the rate of 400*l.* a year, was and still is due and in arrear from the leasees to the plaintiff. To this there was a general demurrer and joinder.

Campbell, in support of the demurrer, contended that the breach laid was bad in substance, the plaintiff having declared for non-payment of rent alleged to be due on the 1st of *November 1797*, which was before his own title accrued, and before the lease itself was granted; and the day on which the rent is due being material, though laid under a *videlicet*(a), cannot be rejected as surplusage, and therefore the repugnancy is fatal. The defendant might have pleaded that no rent was due on that day, or a judgment recovered for all rent due at that time, and the plaintiff could not reply that he went for rent due afterwards, as that would be a departure. 2dly, It appears that the 400*l.* rent to be made up is reserved *yearly*, and must be so in the nature of the thing, notwithstanding what is said of its being rendered on the 1st of every month by equal portions; for till the end of the year it could not be told whether the proportion of coals raised, or the value thereof to be rendered to the lessor, which might be done monthly, would fall short of, or exceed the 400*l.* But if that be a yearly reservation, the plaintiff cannot assign as a breach the non-payment of 900*l.* for a period including a fraction of a year, viz. two years and three months; for no such sum could have been due as claimed by the plaintiff. In these cases there can be no apportionment *pro rata* of the entire sum covenanted to be paid, according to *Needler v. Guest*, Alleyn, 9, and *Rea v. Burnis*, 2 Lev. 124. And no *remittitur* can be entered for the excess; for that can only be done where there is a miscalculation of the sum claimed, not where the demand itself is unwarranted by the covenant.

Richardson, *contra*, was stopped by the Court.

Lord ELLENBOROUGH, C. J. As to the first objection, the breach is first well assigned in the negative, that the defendant has not yielded the 1-4th of the coal, &c. but had neglected and refused so to do. But then it goes on to state, that on a certain day, which is a day before the date of the lease, 900*l.* of the rent was in arrear. That date, however, is quite repugnant and impossible, being before the commencement of the lease by which the rent was reserved: and therefore it may be rejected altogether as surplusage. And that may well be done; for if the allegation had only been that before the exhibiting of the bill two years and three months' rent was in arrear, that would have been sufficient, at least on general demurrer, without stating the very day when that rent became due. I admit that the objection would hold, if it were necessary in this case that some certain day should be alleged when the rent was due; for here the day alleged being repugnant is the same as if none were alleged; but the day is not necessary to be alleged. Then, 2dly, it is objected that the claim of 900*l.* is for rent for two years and three months, when the rent is reserved yearly. That, however, must depend on the construction of the covenant, which, though it speaks of an annual sum of 400*l.* to be made up in case the proportion of coal reserved should fall short of that sum, yet the rent is to be rendered monthly. Taking it, however, to be a yearly rent, the excess for the three months may be remitted, and judgment given for the residue.

LE BLANC, J.(b). The allegation is that on the 1st of *November 1797*, 900*l.* of the rent reserved for two years and three months, at the rate of 400*l.* a year was due, which day being before the lease, and therefore an impossible day for the rent to have been due, it must be rejected on general demurrer. Then even if the rent be reserved annually, and not monthly as it is

(a) *Harvey v. Reynold*, Latch. 200, and *Grimwood v. Barrit*, 6 Term Rep. 460.

(b) *Grose*, J. was absent.

covenanted to be rendered, still the plaintiff's claim would be sustainable to the extent of 800*l.* and the rest may be remitted.

BAYLEY, J. The day alleged is clearly an impossible day, and therefore must be rejected. And though the rent were payable yearly, the plaintiff would still be entitled to enter his judgment for 800*l.*, remitting the other 100*l.*, for which the case of *Inclendon v. Crips*(a) is an authority in point. But here the plaintiff had his election to take his rent either in coals or in money, and the value in money was at all events to be made up 400*l.* a year, and to be rendered monthly. If the plaintiff had taken his proportion of coals, monthly, it would not have been ascertained till the end of the year whether he was to receive any thing, or how much, in money; but having made his election to receive his whole rent in money, and that being at all events to be made up 400*l.* a year, and the rent being made payable monthly, I think that his claim is good to the extent of the 900*l.* claimed(1).

Judgment for the plaintiff.

Reid v. Darby.

10 East, 143. July 4, 1808.

The Vice Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be seaworthy, or repairable so as to carry the cargo to its place of destination, but at an expence exceeding the value of the ship when repaired. Nor does it appear, that the master has any original authority to sell the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised *bona fide* in a case of necessity, still the vessel subsisting as such, and capable of being used for the purposes of navigation, and so used in fact, after some repair on the spot, can only be conveyed by the captain in the form prescribed by the register acts: and the requisites of those acts not having been complied with, the sale in question was held to transfer no property to the vendee.

TROVER for the ship *Glamorgan*. At the trial at *Guildhall* a special case was reserved, stating that the plaintiff, being the sole owner of the *Glamorgan*, belonging to the port of *London*, and duly registered there on the 8th of *December* 1803, sent her, in the spring of 1805, on a voyage from *London* to *Antigua* and back again, under the command of Capt. *Shelly*. The ship delivered her outward cargo at *Antigua* and took in her homeward cargo, and arrived at *Tortola* to join convoy for *England*, on the 16th of *November* 1805. On her arrival at *Tortola*, being leaky, the master applied to the Vice-Admiralty Court there, for a survey, when certain proceedings were had, which were stated at length in the case. 1. The petition for a survey, dated 18th of *Nov.* 1805, and exhibited by a proctor on behalf of the master, and intituled, "*Tortola*—Instance Court—The ship *Glamorgan*—*J. Shelly*, Master—In the "matter of the survey of the ship *Glamorgan*, *J. Shelly*, Master, put into this "port in distress." In this the leaky and dangerous condition of the ship before her arrival at *Tortola* was stated (and verified on the oath of the master:) "and that the master was desirous of having a regular survey held on "the said ship; Wherefore the said proctor prayed, and the Judge at his petition decreed, the usual writ of survey to issue, directed to" certain persons by name, merchants and ship-masters. 2. The commission or writ of survey, of the same date, issued thereon to the persons named, authorizing them to view the state and condition of the ship, and to report thereon to the Court, and particularly whether the ship were sea-worthy or not; and if she could be

(a) 2 *Ld. Ray.* 814, and *Salk.* 658.

(1) *Vide Frazar v. Frazar*, 1 *Penn.* 166. *Stone v. Furry*, *Addis.* 114.

properly repaired in Tortola, so as to render her sea-worthy; and this return was to be made on oath. 3. Several reports, returned on oath by the different persons authorized, which in substance declared the ship to be totally unfit, in her then state, to proceed with her cargo, and that the expence of repairing her at *Tortola* would be more than her value when repaired. These returns were dated 20th of *November*, and 2d and 5th of *December* 1805. 4. The decree of the Court, dated 5th of *December* 1805. "The Judge, having heard the said proofs read, pronounced that it appeared to him, that the said ship is totally unfit to proceed with her cargo to *London*, her port of destination, and that the repairs of the said ship in this port (*Tortola*) would amount to more than her value when such repairs should have been completed." 5. The act to lead commission of sale, dated 16th of *December* 1805, which, after noticing the returns made as above, stated, "that for the benefit of those concerned the master was desirous of selling the said ship and her cargo in this port (*Tortola*), and that he wished to obtain a commission directed to the Marshal of the V. A. Court for that purpose: Wherefore the Judge, at his petition, decreed a commission, &c. to sell and dispose of the said ship and cargo for the benefit of those concerned." Then followed 6. The commission of sale, dated 16th of *December* 1805, stating the previous proceedings, and "that for the benefit of those concerned the master was desirous of selling the said ship and cargo," &c. and to obtain a commission for that purpose: wherefore the Judge decreed a commission, &c. and authorized and commanded the marshal to expose to sale and sell the ship and cargo to the best bidder, and to "pay the produce-money arising from such sale to the said *J. Shelley*, on behalf of the persons entitled thereto, first deducting thereout the expences of the said survey and sale;" and to transmit an account of the sale to the Judge. The case then stated, that under this sentence the ship was sold by the marshal of that Court to the defendant for 885*l.* currency, which was received by *Shelley*, the master, pursuant to the order, who has paid no part of it to the plaintiff, claiming to have an account against him: and possession of the ship was delivered by the marshal to the defendant. The defendant, on the 25th of *January* 1806, procured the ship to be registered *de novo* at *Tortola*, and obtained a certificate thereof; in which it was stated that he was the sole owner of the ship *Glamorgan*, of *Tortola*, and that the ship was built at *Neath*, in the port of *Swansey*, in 1789, as appeared by certificate of registry, No. 433, of the 8th *December* 1803, which was "delivered up and cancelled, on account of the said vessel having put into this port (*Tortola*) in distress, and having been condemned as unfit to proceed on her voyage, and been sold for the benefit of the under-writers or others concerned." Stating further the built of the ship, &c. The defendant, after obtaining such certificate at *Tortola*, sent the ship to *Nevis*, where she arrived on the 2d of *February* 1806, and where he procured her to be again registered *de novo*, and obtained another certificate, dated 13th of *February* 1806, in which it was stated, that he was the sole owner of the ship *Glamorgan*, of *Nevis*, and that the said ship was built at *Neath*, in the port of *Swansey*, in 1789, as appeared by certificate of registry, granted at *Tortola* the 25th of *January* last, and now given up and cancelled on account of the aforesaid owner becoming a resident of this said island. The defendant afterwards sent the ship from *Nevis* to *Grenada*, and from thence with a cargo of sugar and rum to *London*, where she arrived in *July* 1806 and delivered it in good condition. On the 4th of *August* 1806, the plaintiff demanded the ship of the defendant which he refused to deliver up. The collectors of the customs at *Tortola* and *Nevis* transmitted copies of their respective certificates to the collector at the port of *London* who caused the following memorandum to be made in the book of registry at *London*. "Condemned at *Tortola*, and registered *de novo*, 25th *January* 1806." The original *London* certificate of registry has not been transmitted. No bill of

sale, reciting any certificate of registry of the ship, has been made to the defendant; nor has any copy of any such bill been delivered to the person authorized to make registry and grant certificates of registry at the port of *London*: nor any indorsement of or relating to the transfer of property in the ship to the defendant been made on any certificate of registry of the ship; nor any copy of any such indorsement been delivered to the person authorized to make registry, &c. at the port of *London*; nor any entry been indorsed on the oath or affidavit upon which the original certificate of entry was obtained; nor any memorandum made in the book of registry at the port of *London*; nor any notice given to the commissioners of the customs in *England*, otherwise than before mentioned. The question for the Court was, Whether the plaintiff were entitled to recover the value of the ship, and any and what special damage? If the plaintiff were entitled to recover, a verdict was to be entered for him, and the damages were to be ascertained by an arbitrator. If the plaintiff were not entitled to recover, a nonsuit was to be entered. This case was argued in *Hilary* term last by

Richardson for the plaintiff, who contended that the master had no general authority, as such, to sell the ship, and could derive none from a voluntary proceeding, instituted by himself for that purpose in the Vice-Admiralty Court: but that if he had in himself, or could derive from that Court, any such power, the property could only be transferred according to the forms of the registry acts. 1st, The master is considered as the agent for his owners for many purposes; he may hire mariners, procure necessaries for the ship and crew, and in case of necessity may hypothecate the ship in a foreign port, but he cannot sell the ship itself. His authority is to use and employ the ship: but it is contrary to the nature of such an authority to sell what he is to employ. It was so held in *Tremenhere v. Tresillian(a)*, which was a case of strong necessity for the sale by the master abroad, if any thing could justify it; but *Hale, C. B.* was of opinion that the master, without the owners, could not sell the ship. The same general doctrine was laid down by Lord *Ellenborough* in *Hayman v. Moulton and Others*, 5 Esp. N. P. Cas. 65; though he was inclined to admit that in cases of extreme necessity(b), where a ship abroad had received irremediable injury, the captain might have such a power. There, however, the jury found for the owner on the ground of a fraudulent sale. At any rate, however, this was not a case of necessity, in the true sense of the word, a necessity which supersedes all discretion; it was rather a case of *supposed expediency*; in which, as it turned out, the master was mistaken: for the ship was actually repaired, and proceeded on a voyage out and home. The true line is, that while the subject-matter, which he is intrusted to navigate, continues as a *ship*, and capable of navigation, with such repair as is to be had, he cannot sell it; he can only sell the materials when it is broken up, or become a mere wreck. 2dly, supposing the master had the power of sale under these circumstances, he can only transfer the property by observing the requisites of the register acts(c) all, of which may be complied with, as well in the case of a sale by the master as by the owner. The master can only sell, if at all, as agent of the owner, and an agent must always convey in the same form as his principal must have done. The 15th section of the statute 34 Geo. 3. c. 68, does indeed expressly recognize the sale of ships by agents. And this is not contradicted by *Bloxam v. Hubbard*, 5 East, 407, where a transfer of property by operation of law, such as from

(a) 1 Sid. 453. and 3 Keb. 91. S. C., which cites *Bridgman's case*, Hob. 11.

(b) In *Jenkins' Rep.* 165, which was mentioned by Lord *Ellenborough*, upon this occasion, the Reporter says,—“*Observ. Nota, that the master of a ship, in case of danger and extremity, may cast the goods into the sea, and in some cases sell the ship, although it does not belong to him, as in case of famine, &c.*”

(c) The cases referred to were *Moss v. Charnock*, 2 East, 399. *Heath v. Hubbard*, 4 East, 119. *Bloxam v. Hubbard*, 5 East, 407, and *Haytor v. Jackson*, 8 East, 511.

commissioners of bankrupt to the assignees, was held not to be within the acts. 3dly, The Vice-Admiralty Court could give no more authority to the master to sell the ship than he had before. That Court proceeds *in rem*, to give effect to *claims* by adverse parties against the body of the ship; as upon hypothecation and bottomry bonds; in suits where the promoveant claims property in the ship; in suits for mariners' wages; in certain cases of torts, as where there has been a collision between two ships, one of which has been injured, and compensation is sought out of the other; and in cases of salvage, &c. : but there is no trace in the books on this subject of a *suit upon the survey of a ship* to see whether or not she be sea-worthy. Neither do the commissions to the V. A. Courts contain any such power, though they have large and general words as to suits: but all suits in those courts are between different parties, and there is no instance of an *ex-parte* proceeding. And he referred to *Clarke's Praxis Curie Admiralitatis*, which states the mode of proceeding, divided into proceedings *in personam* and *in rem*; particularly tit. 1 and 28: *Dr. Brown's Treatise on the Civil and Admiralty Laws*, ch. 9. p. 396, &c.

Scarlett, contra. The question is, whether when a master of a ship on a distant voyage, exercising an honest judgment, believes his ship to be absolutely incapable of completing her voyage, he may make a sale of her on account of his owners, so as to bind them? If such a power exist at all, it cannot in the nature of it be confined to such cases of necessity in fact as supersede all discretion. Every question of necessity is a mixed question of fact and of judgment: the subsequent events cannot make any difference: but the consideration must be the same as if the purchaser had been obliged to break up the ship immediately. In this case, the jury have concluded the question of necessity by their verdict. As a general rule, it may be admitted, that the master cannot sell (a), though he may hypothecate the ship for repairs and necessaries furnished abroad: but that rule only applies so far as to negative any implied authority from the owner to the master to put an end to the adventure by the sale of the ship: but where the adventure is absolutely put an end to by the perils of the sea or the like, there is no rule of law to prohibit the master from acting according to the best of his judgment for the benefit of his owner by selling the ship. In the case of *The Betty-Cathcart*, 1 Rob. Adm. Rep. 221, which was that of a *British* ship, sailing without a register from circumstances of necessity; Sir *Wm. Scott* said, that the revenue and navigation laws were to be construed and applied with great exactness; but that cases of unavoidable accident, invincible necessity, or the like, where the party could not act otherwise than he did, or had acted at least for the best must be considered in that system of laws just as in other systems; and that would not admit of an equitable construction to be applied to the unavoidable misfortunes or necessities of men, or to the exercise of a fair discretion under difficulties, could not be laws framed for human societies. And there he decreed the vessel not to be forfeited. - So in the case of the *Gratitude*, 3 Rob. A. R. 240. 257. 259. 260, it was admitted, that, generally speaking, the master has no authority over the cargo for the purpose of sale, but only for safe custody and conveyance; and yet, said the same learned Judge, in cases of instant, unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon him, not by the appointment of the owner, but by the general policy of the law, to protect the property. And he instanced the throwing overboard part of the cargo at sea, in imminent danger, to preserve the remainder; and the case of ransom. That there were other cases where the master had the same authority forced upon him in port: as if the ship were driven into port with a perishable cargo, and unable, or wanting repairs to enable her to proceed in time. In that case, said he, he must exercise his judgment,

(a) See *Johnson v. Skippen*, 2 Ld. Ray. 984.

whether to tranship or sell the cargo; and even though he had the means of transshipping, he may act for the best in deciding to sell. But if he acted unwisely in that decision, still the foreign purchaser would be safe under his acts. And there it was held, that he might in a case of distress hypothecate the cargo for repairs of the ship. Sir *Wm. Scott*, in the same case, adverted to the practice in question, of applying to the V. A. Courts in the *West Indies* for leave to empower the master to sell; and though he says it has been a matter of complaint that this power was sometimes abused, yet he admits its existence in cases of real necessity. "Necessity," he says, in another part, 3 Rob. A. R. 266, "creates law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal." In the case of a ship cast on shore, if any thing escaped alive, the property saved was not to be considered as wreck, but by the stat. of Westm. 1. c. 4. was to be preserved by the sheriff, &c. a year and a day for the benefit of the owners. Yet, says Lord *Coke*, 2 Inst. 168, in his comment on it, if the goods be perishable, of necessity, (which is excepted out of the law) the sheriff may sell such goods within the year. It is the common practice of merchants, for the captain to make what salvage he can of the goods, as well as of the ship, in all cases of danger and distress: and this is recognized in the form of marine policies. [*Lawrence, J.* It was held in *Miles v. Fletcher*, Dougl. 230, that where the ship was captured and recaptured, but the voyage was lost, and the captain acting for the best had sold the ship and cargo, the owner might recover against the underwriters for a total loss.] What is the master to do in such cases, if he have no power to sell? he must either suffer the vessel to perish, or it must be preserved at an expence greater than its value. 2dly, If the master have such a power this is not a case within the register acts. All the requisites of those acts could not have been complied with: which shews that none of them were meant to apply to the case of a sale under a power given by law, and not by the act of the party; and that was the distinction on which *Bloxam v. Hubbard*, 5 East, 407, was decided. The 16th section of the stat. 34 Geo. 3, c. 68, which comes nearest to the present case, namely, where the owner is at home, and the ship is sold abroad, only applies, however, to the case of voluntary transfers of ships; and not to cases where the owner ceases to have any interest in the subject-matter as a ship, and only sells it as a wreck, or the materials of a ship. The registry acts certainly would not apply to the case of hypothecation, and by the same rule not to a sale by the like necessity. [*Lawrence, J.* A ship may be worth repairing to a person on the spot, though not so to the owner in *England*. Lord *Ellenborough*, C. J. It is not found that the ship was not navigable, but only that she was not capable of being navigated home with her then cargo. *Le Blanc, J.* While the subject-matter is in the form of a ship, though wanting repairs, which, perhaps, it might not be worth the owner's while to make, would not the provisions of the register acts continue to apply to it, if it were in a *British* port? Lord *Ellenborough*. Must we not consider under the register acts, whether the vessel were sold as a ship, capable of repair, or as a mere wreck?] 3dly, As to the jurisdiction of V. A. Courts to order sales in such cases; it has been frequently exercised of late years, though there is no express adjudication upon the point. The words, however, of their commission are very large and general, extending to all suits, &c. to all cases of wreck and derelict. If then, the captain could not sell, and did not think it was worth while to repair, he must abandon the ship; and then it is clear that the Admiralty Court would have jurisdiction. This consideration forms some check on the abuse of the power; for the master must submit in the first instance a case to that Court, in which he would be obliged to abandon the ship, if he were not empowered to sell it. Lord *Ellenborough*. How can this be considered as a derelict on the high seas, which was in port and under the captain's controul all the time?] Sir *Wm. Scott*, in the case

of the *Gratitude*, seems to recognize the practice as exercised under the Admiralty jurisdiction. At any rate, the defendant is entitled to be considered as the salvor of the ship in this case; the master having abandoned her, and the defendant having brought her home in safety; and therefore the plaintiff cannot maintain trover, without a tender of the salvage. [Lord *Ellenborough*, C. J. If the sale by the master were a tortious act, the defendant cannot thereby acquire a lien on the ship.] (1) No tort was meditated by the master, and there is no privity between him and the defendant, who purchased under the sale decreed by the V. Admiralty Court.

Richardson, in reply, maintained that the sale was not a matter of strict necessity, supposing that to be sufficient, as in the case of a wreck; but of necessity, arising out of discretion and judgment. It was not made, because the captain thought that she could not be navigated after some repair, but that she could not be beneficially navigated. It was his judgment, and which must now be taken to have been his bona fide judgment, upon the expediency of a sale. But the thing was sold as a ship, and not as a wreck: and immediately after, she was registered *de novo*: which shews what the true nature of the transaction was, and brings the inquiry back to the original question, Whether the master could, by his own authority, or by aid of the V. A. Court, sell the ship, because he thought she could not be beneficially navigated any further: and if so, whether the property were legally transferred, without complying with the requisitions of the register acts? The power of sale in the captain is not proved by the clause in sea policies, empowering the captain, in case of misfortunes, to sue, labour, and travail, for the assured; for that is inserted in order to make the underwriters liable for expences incurred in so doing. And as to *Milles v. Fletcher*, the sale was ratified by the owners, and being *bona fide*, it was held to bind the underwriters. The register acts have been held to extend to all sales of British ships by one British subject to another: and must of course include every sale by an agent, under whatever circumstances. Commissioners of bankrupt are not agents of the bankrupt in any sense of the word; but the property, which is vested in them by operation of law, is transferred by statutable authority. Supposing the owner went with his ship, but was not resident abroad, so as to fall within the precise words of the clause referred to; still he could not convey without complying with the requisite forms prescribed; so then must his agent. The only difference between sales abroad and at home is, that in the former case the party has, by s. 17., a longer time allowed to complete the registry: but the agent cannot have a greater authority than his principal. In considering the question with relation to the register acts, the Court cannot enter into any consideration of the motives which induced the sale of the ship. And as to the defendant's lien for salvage, that can only exist where the salvor acts for the benefit of the owners, and not on his own account, as here. [*Le Blanc*, J. If the sale be not lawful, the defendant has converted the property by using it for his own benefit: (2) for he shipped the homeward bound cargo on his own account, and brought it home.]

LORD ELLENBOROUGH, C. J. then stated with particularity the several points arising out of the case; and concluded with saying, that as some of them were of great and general importance to the mercantile world, and to the interests of the country, the Court would take them into mature consideration. And in this term his Lordship delivered the opinion of the Bench.

After stating the case—The transfer of the property in the ship, upon which the defendant in this case relies, can only be supported on one of these two grounds, First, that of a valid sale under the decree and commission of the Vice-Admiralty Court of *Tortola*, where the sale took place; or, secondly,

(1) See *Coulson v. the Neptune*, 2 Peters' Adm. Dec. 356.

(2) See 2 Peters' Adm. Dec. 356.

on the ground of an authority, either express or implied, derived from the owner to the captain, enabling him to sell the ship in such a case as has occurred. For the former, *viz.* that of a valid sale under the decree and commission of the Vice-Admiralty Court of *Tortola*; upon the fullest inquiry we have been able to make, we find no adequate foundation in the legitimate powers of the Admiralty Court. No instance has been discovered in which such a power has been exercised in the Admiralty Court at home: nor can we find any terms in the Vice-Admiralty commission, or any principle upon which that practice can be sustained (which certainly, however, has obtained in the Vice-Admiralty Courts abroad,) of decreeing, upon the mere petition of the captain, the sale of a ship reported upon survey to be unseaworthy, and not repairable, so as to carry the cargo to the place of its destination but at an expence exceeding the value of the ship when repaired(1). And in respect to the latter ground; in addition to the other cases cited in the argument, it is expressly laid down by Lord Holt, in *Johnson v. Shippen*, 2 Ld. Ray. 994., that the master has no authority to sell any part of the ship, and that his sale transfers no property; but that he may hypothecate(2). But supposing that it could be fully made out in argument, that the captain was warranted by an adequate authority, express or implied, from his owner to sell the ship, in the case of a necessity like that which has occurred: still, inasmuch as the ship specifically subsists, and is capable of being used as such for purposes of navigation, and has in fact continued to be so used: we are of opinion that it must be regarded as an object of registration, under Lord *Liverpool's* act, upon any transfer thereof between party and party: and that the forms required by the registry acts not having been in this case complied with, the transfer in question is on that account void(3). We feel ourselves, therefore, in a case where the sale is found to have been bona fide, and made, as it should seem, for the actual, as well as the intended, benefit, at the time, of all concerned, reluctantly obliged to pronounce it invalid; and that the plaintiff, the original owner, still remains such for the purpose of this action, and that therefore he is entitled to recover in this action(4).

Postea to the plaintiff.

(1) See *Wheelwright v. Depeyster*, 1 Johns. 471; *Turnbull v. Ross*, 1 Bay. 20.

(2) The master may hypothecate the ship, but cannot totally divest of, and transfer from the owner all his right, even for a valuable consideration, *without a special authority*. *Warder v. La Belle Creole*, 1 Pet. Admr. Dec. 37. See *Reade v. Comm. Ins. Co.* 3 Johns. 352. Abbott, 7.

(3) See *United States v. Willings et al.*, 4 Cranch, 48.

(4) The law, as to the right of sale of the ship by the master has been differently determined in the U. States. It is there held, that under circumstances of necessity, the right exists. See *Woods v. Clark*, 24 Pick. 85. *The Brig Sarah Ann*, 2 Sumn. 206. *New England Ins. Co. v. The Sarah Ann*, 13 Pet. 387. *Scully v. Bridle*, 2 W. C. C. R. 190. It has also been determined in this country, that the admiralty has jurisdiction, in case of a wrecked ship, to decree a sale, on the application of the master. *The Schooner Tilton*, 5 Mason, 465. See *Domett v. Young*, 1 Carr. & Marsh. 465, and see also, as to the right of the master to pledge the owner's credit, the late cases in England of *Johns v. Simons*, 2 Add. & Ell. 425, and *Stonehouse v. Gent*, do. n. to p. 431.—W.]

Roe, on the Demise of Prideaux Brune, Clerk, v. Edmund Prideaux and Others.

10 East, 158. July 4, 1808.

An estate, the greater part of which was in lease, either for years certain not exceeding 21 or for longer terms of years, determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises, or any part thereof, when he should be in the actual possession of the same, or any part thereof, from time to time, by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding 21 years, or for the life or lives of any 1, 2, or 3 person or persons: so as no greater estate than for 3 lives be at any one time in being in any part of the premises; and so as the ancient yearly rent, &c. be reserved." Held, 1st, that the power only authorized either a chattel lease, not exceeding 21 years, or a freehold lease not exceeding 3 lives; and that a lease by tenant for life for 99 years determinable on lives, as it might exceed 21 years, was void at law, and was not even good *pro tanto* for the 21 years.

But, the special verdict, finding that the tenant in tail had received the rent reserved by such lease accruing after the death of the tenant for life who made it, and who had not given any notice to quit: held, 2dly, that the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon; and for the defect of the special verdict in this respect a *verdict de novo* was awarded. But the Court intimated that under the circumstances of the case, and the disparity of the rent reserved, being 4l. 2s., while the rack-rent value was 60l. a-year; (though one of the lessees had been presented by the homage as tenant after the death of tenant for life, and admitted by the lord's steward; and the 4l. 2s. reserved was more than the ancient rent;) a jury would be strongly advised to decide against a tenancy from year to year.

IN ejectment for lands in the parishes of *Padstow, Little Petherick St. Issey*, in the county of *Cornwall*, the lessor of the plaintiff laid one demise on the 1st of *January 1806*: and at the trial, a special verdict was found, setting forth, in the first place, indentures, of lease and release of the 1st and 2d of *January 1718*, whereby *Edmund Prideaux*, the elder, conveyed to trustees his manors of *Padstow* and *Hustyn*, in *Cornwall*, the advowson of *Padstow*, and his capital messuage, farm, and demesne lands called *Guardandria* and other lands specified, to certain uses therein mentioned; reserving to himself a power of revocation (except only as to the life-estate of *Susanah* his wife), and to limit other uses. Then by lease and release of the 15th and 16th of *March 1728*, made after the death of his wife, *Edmund Prideaux*, the elder, conveyed other premises to the trustees, for the like uses, and with the like power of revocation. Then, by indentures of the 18th and 19th of *October 1728*, *E. Prideaux*, the elder, revoked the former uses, and in consideration of love and affection for his relation, *Edmund Prideaux*, the younger, and for settling and continuing the estates in the name, blood, and family of the *Prideauxes*, he limited the same to the trustees and their heirs, as to all the said manors and lands, &c. except *Guardandria*, to the use of himself for life; and as to *Guardandria*, to the use of *E. P.* the younger for life: remainder to the use of himself for life; remainder as to all the manors and lands, to the use of *E. P.* the younger, for life; remainder to *Humphrey*, the eldest son of *E. P.* the younger, for life; with remainder to his first and other sons in tail male in strict settlement; with like remainders to the second and other sons of *E. P.* the younger. Next followed a joint-uring power to be exercised by *Humphrey* and the other sons of *E. P.* the younger, as they should respectively be seized of any of the said estates, except *Guardandria*. Then came the leasing power, on which the question "turned. "Provided also, that it shall and may be lawful for the said *E. P.* the elder and *E. P.* the younger, and for *Humphrey Prideaux*, (and the other sons, naming them, of *E. P.* the younger) and for all and every other person and persons, who, by virtue of the limitations aforesaid, shall be en-

"titled to the freehold of the premises, or any part thereof, when and as he
 "and they shall be in the actual possession of the same, or any part thereof,
 "by virtue of the limitations hereinbefore contained, or any of them from
 "time to time, by indenture made under his or their hand and seal, hands
 "and seals, to make grants, leases, or demises, of or for all or any part or
 "parts of the demesne lands, whereof he or they shall be in the actual pos-
 "session as aforesaid, for any term or number of years, not exceeding one-
 "and-twenty years, or for the life or lives of any 1, 2 or 3 person or persons :
 "so as no greater estate than for 3 lives be at any one time in being in any
 "part of the premises ; and so as the ancient yearly rent, or a proportionable
 "part thereof be reserved." The special verdict then stated the deaths of
Edmund Prideaux, the elder, on the 1st, of *December* 1728, and of *Edmund*
Prideaux, the younger, on the 10th of *June* 1745, and the seisin of *Humphrey*
 for life. That *Humphrey* had issue the lessor of the plaintiff, his eldest
 son, and also *Humphrey*, *Mary*, *Edmund*, *Neville*, *Richard*, *Nicholas*, *Wil-*
liam, and *Thomas*, his other children. It then set out four several leases
 granted by *Humphrey Prideaux*, the tenant for life, and father of the lessor
 of the plaintiff, for the benefit of his younger children, under which the de-
 fendants, some of his younger children claimed; the validity of which leases
 under the power were now questioned. By the first of these, dated 13th of
January 1792, *Humphrey*, the father, for the advancement of his son *Ed-*
mund, demised to *T. Prater* certain of the lands in settlement, reserving tim-
 ber, mines, and stone quarries, &c. for the term of 99 years, if *Edmund* and
Mary Prideaux; his son and daughter, or either of them, should so long live ;
 the said term to commence from and immediately after the death of *Wm. Ball*,
 or the surrender, forfeiture, or other sooner determination of a former estate in
 the said premises then determinable on his death ; in trust for the use of *Humphrey*
 the father, for life, then for *Edmund*, his son ; reserving an annual rent of 4*l.*
 2*s.* clear of all rates, taxes, and reprises, and 5*l.* in lieu of a heriot, upon the
 respective deaths of *Edmund* and *Mary Prideaux*, after the commencement
 of the term. The jurors then found, that *E. Prideaux*, named in that lease,
 is yet living ; that the rent thereby reserved is more than the ancient yearly
 rent(a) of the demised premises ; and that at the time of granting the lease, *Wm.*
Ball was possessed of the premises for the residue of a term of 99 years, de-
 terminable on the deaths of the said *Wm. Ball* and two others, which two
 others were then dead, under a former lease, dated 2d of *November* 1739, pur-
 porting, in the body of it, to be made between the first named *Edmund Pri-*
deaux, the younger, *Sir John Molesworth*, Bart. and *F. Gregor*, Esq. of the
 one part, and *Christopher Ball* of the other part : but in fact executed by *Sir*
J. M. and *F. G.* (there recited to be the attorneys of *E. P.* the younger,) in
 their own names only ; without naming the said *E. Prideaux* in the execu-
 tion. That *Wm. Ball*, the survivor of the lives therein named, died on the
 25th of *April* 1803 ; and that the premises thereby demised are now worth
 60*l.* a-year, allowing rough timber, to be let at rack-rent. The special verdict
 then set out three other similar leases from *Humphrey Prideaux*, two of them
 dated the 13th of *January*, and the other on the 18th of *June* 1792, for the
 advancement of others of his younger children ; whereby he demised the re-
 sidue of the premises for which this ejectment was brought, for 99 years, de-
 terminable on two lives ; two of the terms to commence upon the death of
 one *Elizabeth Millet*, and the other on the death of one *Samuel Trebilcock*, or
 the surrender, forfeiture, or other sooner determination of a former estate in
 the same premises ; which appeared to have been granted in a similar manner
 and by *E. Prideaux*, the younger, the father of *Humphrey*.

The special verdict also set forth the particulars of those former leases, and

(a) The ancient rent was in fact only 1*l.* 19*s.* 6*d.*

it was urged in argument by the defendant's counsel that three at least of the four preceding leases were void on special grounds, at the time the leases of the 13th of *January* and 18th of *June* 1792 were granted by *Humphrey*: but as the Court afterwards, in giving judgment on the case, declared that their opinion was formed wholly independent of those questions, it is unnecessary to state those particulars, or the arguments founded upon them. It was also stated, that *Elizabeth Millet*, on whose death the second and third leases were to commence, did not die till the 21st of *January* 1800; and that *S. Trebilcock*, on whose death the last lease was to commence, did not die till the 7th of *March* 1799. That the annual rent reserved under the second lease of the 13th of *January* 1792, was 12s. 6d. and a fat capon, &c. which was the *ancient* rent; but that the premises were now worth, at rack-rent, 35l. a-year. That the ancient annual rent of 13s. 3d. and a fat capon, &c. was reserved under the third lease; but the present rack-rent value was 17l. 16s. a-year. That 2l. 14s. 8d., clear of taxes, &c. reserved yearly under the fourth lease, was the ancient yearly rent of the premises; the improved rent of which is now 34l. a-year.

The special verdict then found that on the death of *Trebilcock* in 1799, *Thomas Ball*, one of the defendants, who had before married *Mary Prideaux* named in the lease of 1792, entered and was possessed of the term thereby granted: and, on the 18th of *January* 1800, was presented by the homage as tenant at the manor court of *Padstow*, and paid a fee on his admission. That prior to and at the execution of the deed of settlement of the 19th of *October* 1728, the greater part of the lands belonging to the manors of *Padstow* and *Hustyn*, and amongst others the premises in question, were out on leases, either for years certain not exceeding 21, or for longer terms of years determinable on life or lives, and a very small proportion was in the occupation of *E. Prideaux*, the elder, (the settlor; and that all the lives named in such leases, granted prior to that settlement, were extinct before the granting of the said leases of the same premises in 1792: and that all the leases, the indentures of which are now extant, (of which there are many,) which have been granted by any of the tenants of the freehold in possession since the deed of settlement, have either been for a term of years certain, not exceeding 21 years, or for a longer term of years determinable on life or lives; and that there are no leases extant, granted by any such tenants, for the life or lives absolute of any persons whomsoever. That *Humphrey Prideaux*, the father, died on the 1st of *May* 1795, on whose death the lessor of the plaintiff became seized of the premises comprised in the deed of settlement of 1728, and afterwards received the several rents of 4l. 2s., 12s. 6d., 13s. 4d., and 2l. 4s. 8d., reserved by the said four leases of 1792, up to *Michaelmas* 1806, from the several tenants. That the lessor has not given to the several lessees, or to the occupiers under them, half a year's notice to quit the several premises; but that before the 1st of *January* 1806, he did give notice to the parties claiming under each of the same leases, that he contended them to be void as against him. Upon these facts the jury referred the whole matter to the Court: and the case was argued in last *Easter* term.

Dampier, for the plaintiff, before he argued the principal point, as to the due execution of the power, took up the preliminary objection which would be made as to the want of notice to quit. The value of the premises to be let at rack-rent is so disproportionate to the rents reserved, that these must be considered to be mere conventional rents; and therefore the receipt of these rents by the lessor of the plaintiff cannot entitle the defendants to the half-year's notice to quit, as tenants from year to year, supposing the leases to be void. This was decided in *Right v. Bauden*, 2 East, 260, which varies from the present case only in one respect, that there the tenement was copyhold; and if the receipt of the conventional rent had created a tenancy from year to year,

it would have destroyed the copyhold tenure. The judgment of the court, however, did not proceed upon that ground, though it was urged in argument at the bar; but went on the general ground, that the conventional rent was paid on another account and for a different consideration. This is not a payment for rent on an implied holding, but on an express holding, which fails: how then can the terms of that express holding be referred to an implied holding, when from the difference between the rent and the value, it is highly improbable that such a contract could in fact exist. To entitle a party to notice to quit, he should hold by a title determinable by such notice. The case of *Right v. Bawden* has been acted upon in subsequent cases, at *nisi prius*, and no application has been made for a new trial. In the case of *Mildmay on the demise of Lord Digby v. Shirley*, *Dorchester Sum. Ass. 1806*, where the lessor of the plaintiff claimed 30 acres of leasehold on a lease determinable on lives long before extinct, on which a rent of 13s. 4d. was reserved; it appeared that after the lives had run out, the steward, not knowing that, had continued regularly to receive the 13s. 4d. on the days on which it was reserved by the lease; wherefore it was objected, that this payment of rent created a tenancy from year to year, and that there ought to have been a notice to quit. But *Thomson B.* held that it was not necessary: that no contract as of a tenancy from year to year could be presumed: that the payment was made *alio intuitu*; and that the case fell within the principle of *Right v. Bawden*. The principle upon which a tenancy from year to year is presumed, on the receipt of rent, is, that the rent is a compensation for the land; which in this case it is not; but the true consideration is either a fine, or a natural love and affection.

If this objection be out of the way, the principal question arises on the validity of the four leases of 1792 granted by *Humphrey Prideaux* the tenant for life under the power: the first objection to which is, that they are all reversionary leases, granted to commence, not *in presenti*, but upon the expiration of a former term, then outstanding, upon the respective premises demised, and therefore contrary to the words and spirit of the power, which only enabled the tenant for life, or "person entitled to the freehold of the premises, or "any part thereof, when and as he shall be *in the actual possession* of the same "or any part thereof," to lease "all or any part or parts of the demesne lands *whereof* he shall be *in the actual possession* as aforesaid," &c. It is not enough, that the lessor should be in the actual seisin of the freehold, he must also be in the actual possession of the lands demised; which he cannot be while there is a term outstanding in a prior lessee. A power to grant leases generally will not warrant the grant of a lease in reversion, even in this sense, where it is to commence on the determination of a present outstanding interest: according to the doctrine in *Winter v. Loveday*, *Com. Rep. 39*. *Slocomb v. Hawkins*, *Yelv. 222*, and *Goodtitle v. Funucan*, *Dougl. 565*; in which latter, though the leases were held good, it was because they had an immediate commencement, and were concurrent with the prior subsisting leases: but the reasons there given shew that the leases here cannot be deemed to be concurrent. But if that be otherwise, the second and principal objection is, that *at law* a lease for 99 years determinable on lives, is not an execution of a power to lease "for any term or number of years not exceeding 21 years, or *for* the "life or lives of any one, two, or three persons." The introduction of the word *for* in the place where it is, shews that the words "*not exceeding*" do not apply, and are not continued on, to the words *life or lives, &c.*, so as to connect the term or number of years with those words: the power to lease is not for any term or number of years, *not exceeding 21 years, or* the life or lives, &c., but *or for* the life, &c. The repetition therefore of the word *for* disjoins and separates the sentence, making two distinct clauses: as was held in *Winter v. Loveday*. Nor does the restriction "*so as no greater estate than*

"for 3 lives be at any one time in being" &c. extend back to the term of 21 years, but is referred to life or lives; and means that there shall not be a lease for 21 years and a lease for lives at once on the estate; which might otherwise have been supposed to be authorized; all leases for years being less in the eye of the law than leases for lives. It appears then, that there were only two sorts of leases authorized by the power at the same time, and of the same premises; namely, a lease for years not exceeding 21 years, and a freehold estate not exceeding 3 lives: and the difference between freehold and chattel interests, as well in respect of the quality of the estates, as in the qualifications of different sorts which they confer, and also with respect to executions and forfeitures, is too notorious to insist upon. These leases then, being neither of the one kind or the other, are not a good execution of the power at law; notwithstanding what fell from Lord *Mansfield* and *Wilmot*, J. in *Zouch v. Woolston*, 2 Burr. 1147, that whatever was an equitable, ought to be deemed a legal, execution of a power; for both of them admit that that was not necessary to the decision of the case then in judgment; and they rather seem to hint what the law ought to be, than declare what it is. And Lord *Hardwick* in *Paget v. Gee*, Amb. 200, in 1753, and Sir T. *Clarke* in *Alexander v. Alexander*, 2 Ves. 644. in 1755, (the case of *Rattle v. Popham*, 2 Stra. 992, having been decided in 1735,) and Lord *Kenyon*, in *Doe v. Weller*, 7 Term Rep. 480, clearly recognize the distinction between a legal and equitable execution of a power: which was also recognized by what was done by Lord *Talbot* in *Rattle v. Popham*, after the decision at law. There are several authorities to shew that this is not a good execution at law of the power in question, beginning with *Whillock's* case, 3 Rep. 69. d. where the doctrine is laid down generally, that if one hath power to make a lease for 3 lives, he cannot make a lease for 99 years determinable on 3 lives: and this, it is said, *fuit concessum per totam curiam*. And this case does not fall within the distinctions by which the lease there was supported: for first, this is a restricted power to lease for 3 lives in the body of it; not a general power to lease, restrained only by a subsequent condition: secondly, there is no power here to lease in reversion. The general rule in that case is adopted in 2 Rol. Abr. 260. l. 38, &c., and in *Shep. Touch*. 219, 270; and in the same book, p. 277, it is said to have been "resolved, that if tenant in tail make a lease for 99 years determinable on 3 lives, it is not a good lease." The case of *Rattle v. Popham*, 2 Stra. 992, in this court is an express authority in point, where power being given in a marriage settlement in every tenant for life when in possession to limit the premises to his wife for her life by way of jointure, he made a lease for 99 years determinable on her death. And it was held, that however she might be entitled to relief in equity, yet at law it was no execution of the power; the estates being very different; the one a freehold, the other a chattel. It is true, that Lord *Talbot*, sitting in a court of equity, afterwards set up the lease, saying that it was not a defective but a blundering execution of the power. and made the defendant pay the costs. That was on the ground, as stated by the Master of the Rolls in *Alexander v. Alexander*, that less was given to the wife than what was allowed by the power; but there was no alternative in that case; no direction of the manner in which the tenant for life was to act, if he did not appoint to the extent of his power, but did less by granting a term of years. But here that line is chalked out: if the tenant for life go to the extent of his power, he may grant a freehold lease; if he do not, he must grant such a term as is limited by the power: otherwise, if the principle adopted by Lord *Talbot*, and recognized by Sir T. *Clarke*, in *Equity*, be applied to this power, the words 21 years may be struck out, and a term of 99 years absolute granted, as all terms of years are in contemplation of law inferior to a freehold. A power like this, where the mode of granting terms as well as freeholds is pointed out, is exactly like the powers given by the legislature to tenants in tail, 32 H. 8. c. 28. s. 2, and ecclesiastical per-

sons(a), and must have the same construction in a deed as on the statute book : and in both these cases it is said to have been resolved(b), that a lease for 99 years determinable on lives is bad. This execution of the power is also bad upon the sense and reason of the thing, and the apparent intent of the parties in the deed. Two sorts of leases were contemplated ; freehold leases, and leases for years ; the former indeed are more beneficial to the grantor at the time of the grant, a lease for 3 lives being worth much more for present sale than a lease for 21 years ; but it has its inconveniences as to the renewal : none can take place without the consent of the lessee and the surrender of his lease ; no concurrent or reversionary lease can be granted to any other person, if the lessee will not renew : the remainder-man, therefore, has this chance on such leases. On the other hand, though a 21 years lease be worth less for present sale, yet there is a regular period of renewal ; and if the tenant will not renew, a reversionary or concurrent lease may be granted to another person within the limited period. The tenant for life has his choice of these two methods of leasing ; but he cannot give himself the advantages of both methods by leasing for 99 years determinable on 3 lives, which is not authorised by the power : and gives him the advantage of renewing, upon the dropping in of a life, without the tenant's consent, which he could not do on a lease for lives : so that the remainder-man is sure of finding the estate full leased for 99 years determinable on 3 lives. In the case of *Rattle v. Popham*, 2 Stra. 992, the power extending only to a single life, there could be no prejudice to the remainder-man by reversionary or concurrent leases ; which might be the reason for what Lord *Talbot* afterwards did in equity upon that case.

East, for the defendants. As to the preliminary objection of the want of notice to quit ; the general rule is clear, that the receipt of rent is evidence of a tenancy, and in the absence of any express stipulation between the parties, the presumption of law is in favour of a tenancy from year to year ; and it lies on the plaintiff's counsel to establish this to be an excepted case. But the reason and convenience of the thing, as well as the current authorities, are in support of the objection. The defendants must either be trespassers or tenants, and the lesser of the plaintiff cannot maintain this ejectment, unless he can shew that they are trespassers : but the receipt of rent, *qua* rent, whether more or less, for the very period included in one of the demises laid, is an express recognition of a tenancy of some sort ; and nothing is shewn which determined it as to the other. One of the defendants was presented as tenant, and admitted by the lord's steward since the death of the last tenant for life. All the reasons which originally induced the rule of presumption in favour of a tenancy from year to year instead of the old tenancy at will, and which require half a year's notice to quit, apply as well to this as to any other case. The tenant is induced by this recognition of his tenancy to expend his time, money, and labour in the cultivation of the estate. No safe disinction can be made upon the quantum of the rent paid with reference to the greatest rack-rent value. Where is the line to be drawn ? If it were two thirds, or one half, or a quarter of the actual value, would that constitute a tenancy from year to year ; but if it were an eighth or less, would that subject the party to be treated as a trespasser. The inconvenience and uncertainty which would ensue from attempting now to draw any such line, which is no where to be found in the books, would more than compensate any partial hardship which could arise from adhering to the general rule. The rents reserved and received in this case were not *customary* rents, as in the case of *Right v. Bowden*, 3 East, 260, which has been relied

(a) Vide 13 Eliz. c. 10. s. 3. and 14 Eliz. c. 14. s. 1.

(b) Vide *Shep. Touch.* 277. and 4 Bac. Abr. 69.

on; but they must be taken to have been the ancient rack-rents; the very stipulation in the power that they shall be reserved shews that. At the time of the settlement in 1728, the ancient rents were much less disproportionate to the then actual rack-rent value, than they are now; but lapse of time will not alter the nature of the thing: and if these were then deemed to be substantial and tenantlike rents, though not the most which might even then have been obtained, when did they cease to be so, and become merely nominal, so as no longer to amount to a recognition of a tenancy? If the remainder-man in tail had come into possession within ten years after the settlement of 1728, when the rent reserved might have been a 6th or 5th of the full value, and his receipt of rent from the then lessees would have constituted them tenants from year to year; at what other period would the necessity of giving notice to quit have ceased? The first lease reserved even more than the ancient rent, (in fact more than double,) which increases the difficulty of considering it as a mere nominal rent; though the proportion was as 4*l.* 2*s.* per annum, and 5*l.* in lieu of a heriot, to 60*l.*, the full improved rent. The term *conventional* rents, which these are said to be, has no separate known classification in the law: all rents which are reserved by the convention or agreement of the parties, express or implied, are conventional rents. But as contradistinguished from common rack-rents by the mere disproportion of the value, the case of *Doe v. Watts*, 7 Term Rep. 38, is an authority to shew that the receipt of such a rent will create a tenancy from year to year. That also was the case of a defective execution of a power of leasing, which required the *best rent* to be reserved. The best rent was 60*l.* and the rent reserved was only 36*l.* a year. It seemed admitted, that the remainder-man had accepted the rent in ignorance of the invalidity of the lease; which the court thought made no difference. A case was there cited of *Goodtitle d. Adeane v. Prentice*, Lent. Surrey Assizes, 1790; where a lease of copyhold had been granted by the husband of the wife's land, without her consent, for 41 years, at a *small* rent; and after the death of both, the daughter, not knowing of the invalidity of the lease, had received the rent; notwithstanding which Mr. Justice *Gould* held, that no notice to quit was necessary. Lord *Kenyon* however denied this case to be law; saying that perhaps it had passed without much consideration, and could not be put in the balance against all the other decisions: and all the court agreed that a notice to quit was necessary in the principal case. The case of *Right v. Bowden*, 3 East, 250, which followed, is very distinguishable from the present: 1st, That was a case between lord and copyholder, upon a demise *according to the custom* of the manor, which was binding on both, reserving the *customary* rent, &c., and not as between landlord and tenant in the ordinary sense of the words, upon a demise reserving an arbitrary rent, which is matter of particular stipulation between them. It was considered by the court there, that such a *conventional*, or, to speak more precisely, *customary* reservation, was not to be considered as a rent between *landlord* and *tenant*; and therefore that the receipt of it could not be evidence of a holding from year to year. 2dly, There was another reason urged there by the plaintiff's counsel against the holding under an implied tenancy from year to year; for that must have been by parol: whereas if the land were demised otherwise than by copy, it would have extinguished the tenure. 3dly, The lessors there considered the husband as *equitably* entitled for his life, and by consequence that they were *equitably* entitled to the customary 6*s.* rent; and they had never received any quit rent from the widow, who claimed her free bench, after his death. 4thly, The lessors had never received the particular rent at all; they had only received a gross rent from their lessee of the parsonage, under whom the particular lands were held.

As to the principal point, the construction of the power; the situation of the parties, and of the property, at the time of the settlement, is to be regard-

ed in aid of the construction. The property was mostly out upon leases for 21 years absolute, or for longer terms determinable on lives. The settlement of 1729 gave *E. Prideaux*, the elder, (the settlor) a life-estate in all but *Guardandria*, which was first for life to *E. P.* the younger, with remainder for life to the elder *Prideaux*, and after his death, the younger *Prideaux* was to take a life-estate in the whole; remainder to his sons in succession for life, with remainder to their respective issue in tail. There were, therefore, two estates of freehold in separate possession in the first instance, and the power of jointuring enabled others to be created afterwards: and this accounts for the wording of the power, which is framed with relation to the *possession* of the *freehold* of the premises, and not merely to the actual possession of the *land* itself. The power of leasing is given to the person "entitled to the *freehold* of "the premises, or any part thereof" (*i. e.* of the *freehold* of the premises) "when "and as he shall be in the *actual possession* of the same," (*i. e.* of the *freehold* of the premises) "or any part thereof," (*i. e.* the *freehold* of any part of the premises.) The power itself is "from time to time, by indenture, to make "grants, leases, or demises (*pluraliter*) of or for all or any part or parts of the "demesne lands, whereof he shall be in the actual possession as aforesaid.) These last words still refer to the same general antecedent, which is the *freehold*. The power is to be exercised, *from time to time*, not only over *all* or *any parts* (of the *freehold*) of which the lessor shall be in the *actual possession* as aforesaid, but over *any part*; which looks to a repetition of the exercise of the power over the *same part*. It is to make leases (*pluraliter*, not lease or leases *reddendo singula singulis*, of any part from *time to time*; that is, as each life dropped, or the years run out within 21. Then the power is to be exercised "for any term or number of years not exceeding 21 years, " (*i. e.* absolute) or for the life or lives of any 1, 2, or 3 person or persons." These latter words may either be read as the plaintiff's counsel has read them; or they may be read "for any term, or number of years [not exceeding 21 years, or] for the life or lives," &c. retaining and carrying down the first part of the description to the last: as if the settlor had said, I mean to give the tenant for life the option of granting leases for any term or number of years absolute, not exceeding 21, or *for any term or number of years, for the life or lives of 1, 2, or 3 persons*. And this way of construing the sentence is the only one by which effect can be given to *all* the antecedent words. For there cannot be leases of any one part for different lives, made at different times, running together, as an estate of freehold cannot be made to commence *in futuro*; and yet the former words expressly give a power to make leases from *time to time* of any part; which may well be done consistently with all the words, if the power be understood to warrant leases for *terms of years, for life or lives, &c.* And this meaning of the settlor is rendered more probable by looking to the state of the property at the time of the settlement, which was leased in the same manner; so that a power of leasing for *life* must have been suspended for a long period. But whatever doubt there might have been if the power had stopped here, it is put an end to by the subsequent words, which controul and qualify what goes before, and shew the principal intent of the settlor to be "So as no greater estate than for 3 lives "be at any one time in being in any part of the premises." And this qualification cannot be confined, as it has been argued, to leases for lives; but overrides the whole power of leasing. It could not mean *so as* 4 or more lives should not be running on the same part at the same time, because the power was before expressly limited to 3 lives, and these latter words would be nugatory. Then it does not say *so as* no more than 3 lives be, &c., but *so as no greater estate, &c.* The substance of the qualification, therefore, is, that any *less estate* than for 3 lives might be granted, which was to depend upon the duration of life: in like manner, a lease for any number of *years certain* might be granted, not exceeding 21. And this is further evinced by the re-

ference to "any one time in any part of the premises;" which falls in with the construction before put on the power to make leases from *time to time* of any part; which, with respect to leases determinable on life, could only apply to leases for long terms of years determinable on life or lives; which are *no greater*, but *a less estate* than for 3 lives. This is also consonant to the construction which must be put on the other qualification of the power: "and so as the ancient rent, &c. be reserved;" upon which it is clear that the reservation of a *greater* rent would not avoid the lease: then why should the grant of a *less interest* than the power warrants be an avoidance? He then contended, that if the words were doubtful, the contemporaneous and continued acts of the parties under the settlement, down to the death of the last tenant for life, was evidence to explain what they meant. Upon which the special verdict finds that at the time of the settlement, and since, as far as any evidence at all can be traced, the premises have always been leased, either for years absolute not exceeding 21, or for longer terms determinable on lives, and never for lives absolute. But as the court appeared to lean against the consideration and application of this evidence, and the point had been recently under discussion, he urged the argument no farther than by referring to the modern authorities on the subject: which are *Cook v. Booth*, Cowp. 819, *The King v. The Inhabitants of Laindon*, 8 Term Rep. 379, *Baynham v. Guy's Hospital*, 3 Ves. jun. 298, *Moore v. Foley*, 6 Ves. jun. 238, and *Iggulden v. May*, in Chancery, 9 Ves. jun. 329, and at law, 7 East, 244.

But admitting the true and only proper construction of the words, to extend the power of leasing to life estates, still the party in whose favour the power is created may take *less* than he is allowed out of the estate of the reversioner, who cannot complain of that; and by Co. Lit. 46. a. an estate for life is in the eye of the law "a higher and greater estate than a lease for years, though it be for a thousand or more." The plain meaning of such a power is to enable the tenant for life to charge the remainder-man's estate to a certain extent: to whatever less extent the power is exercised, it is so much gained by the latter; and it was not impossible, though unusual, that one of the lives might have exceeded 99 years. Powers, says Lord Mansfield, in *Goodtitle v. Furuncan*(a), are now a common modification of property in land, and as such are to be carried into effect according to the intention of those who create them. So said Lord Kenyon in *Pomeroy v. Partington*, 3 Term Rep. 676, though judges had sometimes erred in the application. A distinction also appears to have been taken(b) between powers reserved, as in this case, to the owner of the estate, or to one who would have been heir to it; which are always to be construed favourably for such persons; and powers given to a stranger, or to incur a third person's estate; which are always construed strictly: but in no case can it be permitted to a party to complain in a court of justice, that less has been taken from him than might have been. It is not pretended, that a lease might not have been granted for less time than 21 years absolute, *Breers v. Boulton*, 3 Rep. 746, or for fewer than 3 lives, or for more than the ancient rent: then why not for less than one life, as for years determinable on a life which might survive the term. A lease for 21 years determinable on a contingency would be a lease for years not exceeding 21. So the lease might have been for one life determinable on a contingency, as upon the failure of another life, or any other event: yet that would not strictly be within the words of the power. But it is said to have been decided upon authorities, that under a power to lease for lives, a lease for 99 years determinable on lives is bad. All the authorities concluding with that of *Rattle v. Pop-*

(a) Dougl. 573, and vide *Right v. Thomas*, 3 Burr. 1446.

(b) Vide 16 Vin. Abr. tit. *Powers*, 470. pl. 19, cites *Sayle v. Freeland*, 2 Vent. 350. *Fitzgerald v. Lord Fauconberg*, Fitzg. 214, 219, *Fitzwilliam's case*, 6 Rep. 82, and vide *Coventry v. Coventry*, 9 Mod. 13.

ham. are resolvable into and depend upon *Whitlock's* case, 8 Rep. 69 b. to which they refer, where the position in question is a mere *obiter dictum*: for the power to lease there was general; with a proviso that the lease should not exceed the number of 3 lives at most; and under that a lease for 99 years determinable on two lives, to commence after the death or determination of a preceding estate held upon another life, was held a good execution of the power. It is true, that the distinction was there taken, that the power to lease was "in the beginning absolute, affirmative, and indefinite;" and that the proviso afterwards came by way of qualification. But the intent of the parties is to be taken from the whole of the deed taken together, and not from the position of its parts: and great stress is laid throughout that very case upon the intention of the parties. And Lord C. B. *Gilbert*, in his treatise on leases, 3 Bac. Abr. 161. tit. Leases, after mentioning *Whitlock's* case, adds, "It was said by the judges in 2 Keb.(a), that the construction in *Whitlock's* case, that a person having power to make leases for 3 lives could not make a lease for 99 years determinable on 3 lives, was too nice, and expressly contrary to the intent of the parties." The case of *Rattle v. Popham*, 2 Stra. 992. and Cun. Rep. 102, is the only express decision upon the point of law; which does not appear by the different reports to have been much debated either on the bar or on the bench; but to have proceeded upon the dictum in *Whitlock's* case, which was the only authority cited at all bearing upon the particular question. The propriety of that decision, however, has been strongly shaken by what fell from Lord *Mansfield* in *Zouch v. Woolston*, 2 Burr. 1147; who says, that "Lord *Talbot*, arguing from the same premises, "the power, and the lease, without any other circumstance, held the lease to be warranted by the power," &c. And this is confirmed in substance by the Master of the Rolls, Sir *Thomas Clarke*, in *Alexander v. Alexander*, 2 Ves. 644. But it is contended, that there is a distinction between a legal and an equitable execution of a power. It is difficult, however, to understand the grounds of such a distinction in construing the words of any instrument. Courts of equity, as well as of law, profess to construe all instruments according to the intention of the parties, to be collected from the words and subject-matter of the instruments themselves. How then can there be an acknowledged different rule of construction of the same words on different sides of the *Hall*. Lord *Mansfield* in *Zouch v. Woolston*, adopting the argument of Mr. *Dunning*, expressly denies any such distinction, and says, that "whatever is a good power or execution in equity, the statute (of uses) makes good at law." And *Wil-mot*, J. agrees with him. Lord *Mansfield* also distinguished powers of this sort from mere legal powers introduced by statute, such as leases by ecclesiastical persons or tenants in tail. Though it does not appear by any express decision, that leases for 99 years determinable on 3 lives are not within the statutes regulating such leases. Lord C. B. *Gilbert* only says, 4 Bac. Abr. 69. rule 4, that such leases "seem not good within the statutes:" and he thinks afterwards that they would be good within the stat. 32 H. 8. c. 28. upon the reasoning in *Whitlock's* case: and he cites *Smith v. Trinder*, Cro. Car. 22., where a lease by husband and wife of the wife's lands for 60 years, if she should so long live, was considered sufficient to bind her within that statute. And in *Threadneedle v. Lyncham*, 3 Keb. 595, Lord *Hale* and the rest of Court said they would not then dispute whether a bishop's lease on the stat. 1 Eliz. c. 19. for 99 years determinable on 3 lives were good or not. But at any rate, this case is distinguishable from that of *Rattle v. Popham* by reason of the latter words of the power, "So as no greater estate," &c. which ride over and qualify the grammatical strictness of the former words, and give the

(a) The margin of *Gwillim's* edition of Bac. Abr. refers to p. 786. where this expression is not to be found; but *Jones and Twissden*, judges, say generally, on the statute of leases, avoiding leases otherwise than for 3 lives or 21 years, that a lease for less, is good.

tenant for life full scope to grant any lease determinable on lives, less than an estate for 3 lives. And such appears to have been the opinion of the Court in that case from Mr. Ford's MS. note of it; which in the main agrees with the report in *Strange*; but adds, *per Curiam*, "If the power had been general to provide for a wife, so as that he did not make a greater estate than for life; because an estate for years determinable on a life is a less estate, such an estate might have been raised by virtue of the latter power, which authorizes the creation of any estate that is not greater than an estate for life," &c.

Supposing, however, the leases not to be good to the extent of them, at any rate they are good for 21 years determinable on the lives; for still they will be leases for 21 years; and the excess is apparent upon the face of them: In *Zouch v. Woodston*, 2 Burr. 1147, Lord Mansfield said, considering powers brought into the common law by the statute of uses as a mode of ownership or property, "no doubt could ever have been made whether a man might not do less than his power: or if he did more, whether it should not be good to the extent of his power." In *Alexander v. Alexander*, 2 Ves. 644, Sir Thomas Clarke puts the case, "suppose a power to lease for 21 years, and he leases for 40; that shall be good for 21, because it is a complete execution of the power, and it appears how much he has exceeded it. If the Court, can see the boundaries, it will be good for the execution of the power, and void as to the excess." So Lord Kenyon, when Master of the Rolls, in *Pitt v. Jackson*, 2 Bro. Chan. Cas. 54, considered that the excess only in the execution of a power was void. The same principle was also laid down by Dyer, J. in *Phillpott's case*, M. 16 Eliz. in C. B. 3 Leon. 29. "where a man hath a warrant to do a thing, and he doeth it, and more, so as he exceeds his warrant; yet it is good for that part which is warranted, and void for the rest." Mr. Parker had power to raise 7000*l.* for younger children by deed or will: and by will he charged the premises with 5000*l.*: and decreed (a) to be good for the 7000*l.* In *Parry v. Bowen*, 3 Chan. Rep. 11, it was resolved by Lord Chancellor, that where a person hath power to lease for 10 years, and he leaseth for 20 years, the lease shall be good for 10 years in equity: and he said, it had been so settled several times in that court. Courts of law are in the constant practice of applying the same principle to awards; if an arbitrator has exceeded his authority, and the measure of excess be apparent, the award is held good *pro tanto*.

Then as to the objection of this being a reversionary lease; if the tenant for life could demise at all for more than 21 years determinable on lives, there can be no objection to such concurrent chattel leases for lives, not exceeding 3, which are all running out at the same time: though the one be not to commence in possession till the determination of the other. If there could be no objection to a demise for 99 years determinable on the lives of A. B. and C. to take severally in succession, in the same instrument; what difference can it make that they take by different instruments, or at different times. If the 3 lives be consuming at the same time, the reversion is not burthened beyond the terms of the proviso. The construction contended for would put the landlord in the power of the tenants, and compel him to purchase their surrender of the former estate, previous to every renewal, without any benefit to the reversioner. But even upon the disabling statutes, which have received so strict a construction, it has been long settled that concurrent leases are good: as in Co. Lit. 45. 4 Bac. Abr. 64, 5, 6, and the cases there cited. Concurrent leases under powers to lease in possession for years certain, or determinable on lives, have also been expressly held to be good, in *Winter v. Loveday*, Carth. 427, and 5 Mod. 391, *Read v. Nash*, 1 Leon. 147, *Fox v. Collier*, 1

(a) *Parker v. Parker*, in 1714, Gilb. Eq. Cas. 168, and cited by the Court in *Coventry v. Coventry*, 1 Stra. 604.

And. 65, *Conentry v. Coventry*, Com. Rep. 313, *Goodtitle v. Funnican*, Dougl. 565, 572, and *Doe v. Calvert*, 2 East, 376. And the legality of such leases was assumed by the legislature in the act for regulating the granting of the rolls leases(a), which controuls the exercise of the power to within 7 years of the expiration of the existing lease. In the first mentioned of these cases, it was considered that where the lease depended on the duration of lives, they must, from the very nature of the thing, be concurrent and not reversionary. The lease established in *Whitlock's* case was a concurrent lease.

Dampier was heard in reply at length, and observed as to the argument that the leases were good at least for 21 years, though void for the excess, that it was only a rule of equity, which had never been acted upon at law.

The Court directed the case to stand over for consideration: and in this term

Lord ELLENBOROUGH, C. J., after stating the substance of the special verdict, delivered the opinion of the court. This verdict furnishes two questions: the one, whether these four leases were warranted by the power; and the other, whether a notice to quit was in this case necessary. Two objections have been made to the leases; one, that they were to commence *in futuro*, and therefore such as the power did not warrant; the other, that the power did not authorize any lease for years which might by possibility exceed 21: and if we are of opinion that the latter is a valid objection, it is unnecessary to say any thing upon the former. The power authorizes the grant of either a chattel, or a freehold lease; the former not to exceed 21 years, nor the latter three lives: it is in the alternative to grant either the one or the other, but not both: so that the same premises cannot at any one time be under leases both for years and lives. It was held in *Elmer's* case, 5 Co. 2, and *Marler v. Wright*, Moor, 263, 4, that under the stat. 5 Eliz. c. 19. s. 6, which vacates all bishops' leases, except such as are for 21 years or 3 lives, the same premises cannot be under leases for years and lives at the same time: and it should seem equally objectionable under such a power as this. If this be so, it may make an essential difference to the reversioner or remainder-man, whether the premises are let for three lives, or for 99 years determinable upon three lives. A chattel lease may be granted pending a prior subsisting one, provided it be within the limits of the power, and provided it give no beneficial interest during the continuance of the subsisting lease: but so long as there is a freehold lease *in esse*, a second freehold lease cannot be granted. The right of granting a second chattel lease was settled in *Read v. Nash*, 1 Leon. 148, and is recognized as law in *Goodtitle v. Funnican*, Dougl. 3., ed. 572: but a second freehold lease cannot be granted, because it must be to take effect *in futuro*, and a freehold cannot be conveyed unless it is to take effect *in presenti*. 2 Wils. 166. If a lease therefore were granted for lives, no further lease could be granted till that lease were determined; not a chattel lease, because the power does not admit of the same premises being under a chattel and a freehold lease at the same time: nor a freehold lease, because that would be to commence *in futuro*: whereas, if there were a chattel lease for 99 years, determinable upon three lives, and one of those lives were to drop, a second chattel lease for a new life, in addition to the other two, might be granted during the continuance of the first. Whenever a life therefore dropped, there would be this essential difference between a freehold and a chattel lease, that upon the former, no new life could be added, unless the termor would surrender the first lease: whereas, upon the latter, a new life might be added without any such surrender. In the one case, therefore, an important advantage would accrue to the reversioner or remainder-man, if the tenant for life and the person intitled to the first lease could not agree upon a surrender: in the latter, such advantage would be wholly lost. Attending, therefore, to this material difference between

(a) Vide *Wilson v. Sir T. Sewell*, 4 Burr. 1976.

the two descriptions of leases, can the court say, that when the power uses terms applicable to one of them, the party is intitled at his option to grant the other? Can the court say, that the person who created this power had not this difference in contemplation, and did not intend the reversioner or remainder-man should have the advantage which might result from confining the tenant for life to that species of lease which the power expressly mentions? In *Whitelock's* case, 8 Co. 69 b. this very point was conceded by the whole court; and if that case be law, the question here is at an end. In that case there was a *general* power to make leases, so as they did not exceed 3 lives or 21 years; and under that, a lease for 99 years determinable upon 3 lives was adjudged good; because the only restriction in the power was, that the lease should not exceed 3 lives or 21 years: and a lease for 99 years determinable upon three lives is a lease not exceeding three lives. But a difference was taken between a *general* power, not specifying the kind of lease, but adding a restriction to limit the extent of the leases; and a power *particularizing the species of lease* to be granted: and it was said, that "if one hath power to make a lease for three lives, he cannot make one for 99 years determinable upon three lives; *quod fuit concessum per totam curiam*." This position, though not the point decided, is adopted by Lord Rolle in his abridgment, vol. 2. p. 260. pl. 3. and by Doddridge, J. in *Sheph. Touch.* 269. In *Rattle v. Popham*, 2 Str. 992, it was adjudged by Lord Hardwicke, and the other judges of B. R. that a power to limit an estate to a wife for life did not, at law, authorize the granting her an estate for years determinable upon her death: and according to the report of this case by the late Mr. Ford, the Court recognized the distinction laid down in *Whitelock's* case between such powers as particularize the species of leases to be granted, and such as do not. It is true, that after the decision in *Rattle v. Popham* in K. B. Lord Talbot supported that lease in equity; and in 2 Burr. 1147. Lord Mansfield throws some discredit both upon *Whitelock's* case and *Rattle v. Popham*; but in *Shannon v. Breadstreet*, Reports temp. Lord Redersdale 66 to 71 or 1 Schoales & Lefroy's Rep. Lord Mansfield's observations are canvassed by Lord Redersdale, and the determination in *Rattle v. Popham* is approved of by him. And after full knowledge of what Lord Talbot had done after the decision in *Rattle v. Popham*, Sir Thomas Clarke when sitting for Lord Hardwicke, appears to have considered that decision right. In 2 Ves. 644, he says "Suppose one has power to jointure a wife for life, and appoint to her for 99 years if she so long live; as in the case of Mr. Newport; at law it was held in *B. R.* to be void, but in equity good *pro tanto*." It is therefore our opinion, both upon principles and upon authorities, that as this power authorized leases for 21 years or three lives only, the leases in question, which are for 99 years determinable upon three lives, are not warranted by it. It was argued that the leases, if not good for the 99 years, might still be good for 21 years, should any of the lives so long continue; but it is sufficient to say that no authority was cited to shew that a court of law has ever held itself intitled to consider such a lease as good in part.

Upon the 2d question, Whether a notice to quit were in this case essential, we are afraid the special verdict does not enable us to decide the point. The receipt of rent is evidence to be left to a jury that a tenancy was subsisting during the period for which that rent was paid; and if no other tenancy appear, the presumption is, that that tenancy was from year to year: (1) and if there were a tenancy, it is not for the court to say, whether it be continuing or ended. In *Roe v. Ward*, 1 H. Black. 97. where tenant for life made a lease and died, and the remainder-man received rent from the lessee for two years: the payment on the one hand, and the receipt on the other, were considered as evidence of an agreement for a tenancy from year to year upon the

(1) Vide *Jackson d. Livingston v. Bryan*, 1 Johns. 322, 6, 7.

terms contained in the lease. And in *Doe v. Watts*, 7 Term Rep. 83. where tenant for life made a lease not warranted by his power, and the remainderman received the rent reserved by it, this Court held this receipt evidence of a tenancy from year to year between the lessee and the remainderman; notwithstanding a case of *Goodtitle v. Prentice*, in which *Gould, Justice*, ruled the contrary: and the plaintiff having been nonsuited for want of a notice to quit, the nonsuit was confirmed. It has been argued that the great disproportion between the rents reserved, and the real value, will enable us to say that the receipt of the rents did not create a tenancy from year to year: and *Right v. Bawden*, 3 East, 260, has been cited to satisfy us it did not. In *Right v. Bawden*, however, there was no proof that the lord knew of the payment: for it was made to his lessee; and that was a special case, not a special verdict: and as it was obvious the jury must have been directed to draw a conclusion against a tenancy from year to year, the payment being made with reference to a supposed tenancy of another kind, the Court might not think it necessary to send the case back to have that conclusion drawn. This is a special verdict, upon which if what the jury has found be evidence, and sufficiently material not to be rejected as surplusage, the court cannot draw the conclusion of fact which is to result therefrom, however palpable it may be what that conclusion ought to be. As to the disproportion between the rent and the value, the verdict does not enable us to say what that disproportion was during the period for which the rent was received, because it only finds what was the value at the time of the verdict: but if the disproportion at the time for which the rent was received were ever so clearly ascertained, we could not act upon it, because it would only furnish ground to induce a jury to decide against a tenancy. The receipt of the rent is some evidence of a tenancy; upon that evidence it is peculiarly the province of the jury to decide; and though they would probably receive a very strong direction to decide against a tenancy, yet they only can decide it: and unless the defendants, therefore, will consent to strike out from the special verdict every fact which can be deemed any evidence of a tenancy from year to year, we are of opinion there must be a *venire de novo*(1).

Bourne v. Taylor.

10 East, 189. July 4, 1808.

The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing.

But where the defendant justified under the lord, as being seized in fee of the veins of coal lying under the copyhold tenements *together with the liberty of boring for and getting the coal*, &c. it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor, and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse the *liberty of working the mines*: because the plea claims such liberty not merely as annexed to the seisin in fee to be exercised when in actual possession, but as a present liberty, to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it.

TRESPASS for breaking and entering the plaintiff's close, part of the North Farm, otherwise *Lowstead Farm*, and another close, part of the Town Farm, in the township of *Backworth*, in the county of *Northumberland*, and subverting the soil and digging and boring the same, &c. The defendant pleaded the general issue and six special justifications of the trespasses, as servants, and by command of the Duke of *Northumberland*. The 1st of these

(1) Vide *Denn d. Bruce v. Rawlins*, post 361.

stated that the Duke, at the times when, &c. was and is seised in fee of the manor of *Tynemouth*, with the appurtenances, in the said county, of which the closes in question have immemorially been parcel and copyhold tenements of the manor: and that *by reason thereof* the Duke was entitled to all *mines and veins of coal* in and under the same closes, &c. *and to bore for, dig for, and get such mines and veins of coal.* The 2d justification stated the same right in the Duke, *he making and allowing to the copyhold tenants of the said closes* in which, &c. and their tenants and occupiers thereof respectively. *a reasonable satisfaction and compensation for all damages* done or occasioned to them respectively by such boring for, digging for, and getting such veins and seams of coal as aforesaid. The 3d stated that the places in which, &c. from time immemorial have been parcel of the said manor; and that the Duke is *seised in fee of and in the veins and seams of coal* lying within and under the copyhold tenements within and parbel of the same manor, *together with the liberty of boring for, digging for, and getting such veins and seams of coal there, and of doing all such acts as might or may be necessary* for those purposes, or any of them. The 4th stated the same right in the Duke as the 3d, *he making and allowing to the said copyhold tenants, &c.* (as stated in the 2d justification) *reasonable satisfaction and compensation for all damages* occasioned to them respectively by the boring for, digging for, and getting the said coals, and the doing such necessary acts as aforesaid. The 5th and 6th justifications were like the 3d and 4th, with the additional allegation that the Duke was also seised in fee of the *manor of Tynemouth.*

The plaintiff demurred specially to the first and second justifications, because they do not allege *as a fact* that the Duke was entitled to bore for, dig for, and get the coal within or under the copyhold tenements of the manor, but alleges that he was so entitled *as a consequence of law*, arising from the fact of his being seised in fee of the manor: and because those pleas do not shew how the Duke's supposed right to bore for, dig for, and get the same coal, or to enter and dig in the close, &c. for that purpose, arose; whether by custom, prescription, grant, or how otherwise. And to the other justifications the plaintiff severally replied, that as well all the said veins and seams of coal within and under the same close in which, &c. as the rest of the soil and ground of and within and under the same, from time immemorial have been parcel of the manor, and demised and demiseable by copy of court-roll, &c. *without any exception or reservation thereout or therefrom of the mines or seams of coal within or under the said closes in which, &c. or either of them, or any part thereof.* That before the said Duke was so seised of the said manor, the late Duke was lord of the same, and seised thereof, and at a court baron, &c. granted the said closes in which, &c. to Sir *Mathew White Ridley* Bart. and *Charles Brandling* Esq. to hold to them and their heirs at the will of the lord, &c. and the survivor of them demised to the plaintiff, &c. The defendant demurred specially to these replications to the pleas, because they do not directly traverse, nor confess and avoid, the matters of the said pleas, and are argumentative and not issuable. The case was argued in the last term.

Holroyd for the plaintiff. The principal question is, Whether, without any special custom, or special reservation of the mines, the lord has a right to enter upon the copyholder's land and dig for coals there, either with or without making him compensation for the injury done to the surface. The defendant by his pleas admits the lands to be copyhold; and the plaintiff by his replications to some of them alleges that they have been immemorially demiseable by copy, without any reservation of the mines of coal. Where there is a grant of the land itself, all above and below the surface passes with it, 1 Blac. Com. 18, unless specially reserved. This indeed is not the nature of the copyholder's estate; for without a special custom he cannot dig the mines under his copyhold; nor can he cut trees, except for special purposes, as for repairs, or toppings and loppings for fire-bote; because, not having the freehold of

inheritance in him, it would be waste. If the mines were reserved out of the grant, though no waste could be committed of them, the tenant digging for them would be a trespasser. But where any estate or interest in land is granted, the lessee or grantee takes not only the surface, but all above and below it: and no other can break the soil, without committing a trespass upon the tenant's possession. If mines were opened before, the tenant may dig and take the profit thereof; which shews that the mines themselves are granted, though it be waste in him to dig for any new mine without licence(a). Where the mines are expressly reserved to the lord, that may be an implied reservation of his right to enter and dig for them: but without such express reservation, or a custom reserving the right to the lord, which is equivalent, it would be derogatory to his grant to enter and dig where he has granted the land generally. The copyholder is clearly entitled to all the profits of the soil, of part of which he must be deprived, if the lord may enter upon and dig the soil for coal, which cannot be procured without a great destruction of the surface about the opening of the mine. The lord, therefore, having parted with the right of possession to the whole during the time of the grant, must necessarily be a trespasser if he enter upon the copyhold. The general rule is, that every grant is to be taken most strongly against the grantor, within the words of it. With respect to the particular case of copyholds, in *The Earl of Kent v. Walters*, 12 Mod. 317. *Northey* having contended that by the general custom of copyholds the lord might cut trees on them, for otherwise, if it were a copyhold in fee, the wood would never be cut, which would be inconvenient; Lord Holt denied the lord's right; and said that the copyholder had the same interest in the trees that he had in the land. And in *Ashmead v. Ranger*, 1b. 678. Com. Rep. 71. and 1 Ld. Ray. 552, this Court held that trespass lay against the lord for entering and cutting down trees on the copyhold; Lord Holt again affirming his former opinion, that the tenant had the same customary or possessory interest in the trees that he had in the land: and adding, that if the lord had a mind to cut trees, he must compound with the tenant. This judgment was affirmed in the Exchequer-chamber by all the Judges: but it appears (11 Mod. 19. and Salk. 638.) to have been afterwards reversed in the House of Lords by 11 against 10; because the tenant could not cut the trees, and if the lord could not, they must rot on the land; for then nobody could. At most that judgment can only conclude that particular case. That mines pass by the general grant of an estate appears from *Clavering v. Clavering*, 2 P. Wms. 338, where tenant for life answerable for waste was held entitled to open new shafts for the further working of an old vein of coal. But the point now in judgment seems to have been decided in *Player v. Roberts*, W. Jones; 244, where the case is put that a man grants the coal and coal mines within a manor, parcel of which was copyhold, held for life, to J. S.: the lessee (stated by mistake for the lessor) enters on the copyhold, and digs a new pit there, during the life of the copyholder, and takes the coals and converts them to his own use; and the lessee of the coal mine brought trover against the lessor; and held that he might; for neither the lessee, nor the lessor, could enter on the copyholder to dig the coals; for the copyholder shall have trespass for breaking his close and digging of the coals: but that when the coals were dug out of the pits by the lessor, or lessee, or by a stranger, they belonged to the lessee, who should have trover against any one who took them. In *Lyddal v. Weston*, 2 Atk. 20, upon a question whether the plaintiff could make a good title, Lord Hardwicke, C. said, that there was no instance where the crown had only a bare reservation of royal mines, without any right of entry, that it could grant a licence to any person to come upon another man's estate, and dig up his soil and search for mines; and he thought that the crown had no such power. But when the mines were once opened,

(a) Saunders' case, 5 Rep. 12. Co. Lit. 54. b.

the crown may restrain the owner of the soil from working them, and may work them on its own account, or grant a licence to others to do so. In *The Bishop of Winchester v. Knight*, 1 P. Wms. 406, the facts were, that a customary tenant holding under the bishop had opened a copper mine where none had been before, and dug out and sold great quantities of ore, and after his death his heir had continued to dig for and dispose of other copper ore. The bishop filed his bill against the executor and heir for an account. Lord Chancellor *Couper* considered that the executor would be liable, if the tenant had no right; but this being a question at law, and doubtful upon the evidence before him, he directed an action of trover to be brought by the bishop against the then tenant: which the report states was tried: and there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper mines. So that upon the producing of the postea, the Court held that neither the tenant without the licence of the lord, nor the lord without the consent of the tenant, could dig in these copper-mines, being new. And, lastly, in the case of *Grey v. The Duke of Northumberland*, 13 Ves. jun. 236, Lord Chancellor restrained the lord of the manor from opening a mine, which he was preparing to do, upon the plaintiff's copyhold land.

The question upon the pleadings was also discussed by the counsel on both sides; but it is sufficient to refer to the opinion of the Court upon this point.

Hullock, contra. It is admitted that the freehold is in the lord, and that he has a right to all mines under the surface of the copyhold; and that when severed and taken by any other, the property is in the lord, and he may recover it in trover. The question then is, whether having a clear right of property in the subject matter, he has not, necessarily incident to that right, the power of taking it. A copyholder, in the origin of the tenure, was a mere tenant at will; and at this day can derive no other rights to his estate than what have in fact been exercised from all time, and which are therefore given to him by the custom of the manor. In every instance of the exercise of a right of property over his estate, it lies upon him to shew a custom for what he claims; and whatever he cannot claim by custom remains in the lord, whose rights are reserved to him by the common law, and are not dependant on the custom. The lord might originally have granted the copyhold with what reservations he pleased: and it must be presumed that he reserved every part of the copyhold which the custom does not shew that he granted to the copyholder, with all the powers incident to the enjoyment of such reservation. [Lord *Ellenborough*, C. J. In the absence of all other evidence of the grant than the custom, does not the absence of any custom either for the lord or the copyholder to open mines shew what the terms of the grant were?] The origin and nature of this kind of estate must be attended to. The copyholder's estate has grown out of encroachments on the lord. Even at this day the grant does not operate as a common law grant would. Nothing passes by it but the mere use of the surface of the soil: the trees and mines still remain in the lord, in whom is the freehold of the whole. The lord's rights must either be taken to have been reserved out of the original grant, if any, or to be excepted by the common law; for certainly they are not derived from the custom. In *Folkard v. Hammett* and others(a) where, in case by a commoner against a stranger for digging the soil and erecting buildings on the common, the defendant justified under a grant of the soil by the lord with the consent of the homage according to the custom; Lord C. J. *De Grey*, after hearing evidence of similar grants by the lord for a long period back, said he would not call it a custom, but a usage; because he considered it as a reserved right of the lord: and that it was legal. If mines be expressly reserved to the lord in a grant, the law would reserve his right of entry and digging there, as inci-

(a) *Sittings after Easter* 16 Geo. 3 C. B. 5 Term Rep. 417. note.

dent to such reservation. And the legal effect of an exception of reservation by the law cannot be less beneficial than if it were by the act of the party. The lord's right, however, is rather an exception, which, as lord *Coke*, Co. Lit. 47. a. says, is ever of part of the thing granted and of a thing *in esse*, than a reservation, which is always of a thing newly created or reserved out of the land demised. Then the law excepts every thing which is incident to the enjoyment of the thing excepted; and when it gives any thing to one, it gives impliedly whatsoever is necessary for the taking and enjoying the same, 2 Inst. 306. Co. Lit. 56. a. and Finch's Law, 63. If trees be excepted in a lease, the law gives the lessor and those who would buy of him power to enter and shew the trees. So it gives power to him who has a conduit in the land of another to enter and mend it when needful. *Liford's case*(a). In the case of mines, Plowd. 313. 323. 336, it was held by all the judges, that the king, having by his prerogative a right to all gold and silver mines throughout the realm, had also the liberty to dig and lay the same upon the land of the subject, and carry it away from thence: which is directly against what is said by Lord *Hardwicke* in *Lyddal v. Weston*, 2 Atk. 20. If one have a right of way over another's land, he may enter to repair it, Finch's Law, 63. If this right of the lord affect the copyholder's enjoyment, it is because of the nature of his tenure: and though every grant is to be construed most strongly against the grantor, that only applies to that which is meant to pass, but not to an interest, which it is admitted did not pass. The case of *Player v. Roberts*, W. Jones, 244, was a question of property between the lord and the lessee of the coal mine, concerning coal severed from the mine; and no doubt the property when raised was in the lessee, whether rightly dug or not; and therefore all that was said in respect of the right to dig was beside the point in judgment. But the final determination of the lords in *Ashmead v. Ranger*, Salk. 638, and 11 Mod. 18, is a direct authority upon the principle to govern this case. The cases of trees and mines are in every respect analogous. The right to both when severed is in the lord: with the exception of such trees as the tenant is entitled to take for repairs. Then if the lord were adjudged to have a right to come upon the land, and cut down and take the timber as incident to his right to it when standing: by the same rule he must have an equal right to take the coal or metals under the surface in the only way in which they can be gotten, by digging for them. The judgment of the lords there was conformable to the opinion delivered in *Heyden v. Smith*, 13 Rep. 67, Brownl. 328, and Godb. 172; where in trespass by a copyholder against the lord's bailiff for entering his close and cutting down a timber tree; the fourth resolution was, that the lord cannot take *all* the timber trees; but he ought to leave sufficient for the reparation of the customary houses, &c.. And in the report of the same case in *Godbolt*, Lord *Coke* says, that "without any custom the lord may take the trees, if he leave sufficient to the copyholder for the reparations." There are also other authorities to that effect, 1 Leon. 272, case 365. *Ayray v. Bellingham*, Finch's Rep. 199. 2 Brownl. 200. In the case of *The Countess of Rutland v. Gie*, 1 Sid. 152. 1 Lev. 107. and 1 Keb. 557, the Court denied a prohibition to restrain a rector from digging for lead in his glebe; saying, that if he could not dig mines in his glebe, all the mines under all the glebes in England must remain unopened. And *Twisden, J.* thought that the lord might open a mine in a copyhold of inheritance; though *Foster* and *Keeling, Js.* thought that he could not. Upon the whole, there is no decided case against the lord, and all legal analogies and principles are with him; for it is absurd and against public policy, that the owners of so great a mass of property should be precluded by law from the enjoyment of it.

Holroyd in reply, upon the general question, said, that if a mine, lime pit, or stone quarry, were once lawfully opened upon the copyhold, the copy-

(a) 11 Rep. 52. and Perks's. 111. and vide *Hodgson v. Field*, 7 East, 613.

holder may dig and enjoy it; which shewed that an interest passed to him in the land beyond the mere use of the surface. It is also shewn by this, that if the copyholder himself open a new mine, it is *waste* in him; whereas if no interest passed to him in it, it would be a trespass, and not waste: and therefore not a forfeiture of the copyhold. Even as to trees, it is said in the 5th resolution of *Heydon v. Smith*, 13 Rep. 68, 9, that the copyholder may maintain trespass against the lord, for breaking and entering his close, and cutting *arborum suam*. And in *Folkard v. Hemmett*, the lord's right was claimed and supported by *usage*; which was evidence of an express reservation in the original grant of the right of common.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. This was an action of trespass. The defendant pleaded six justifications. The first stated that the Duke of Northumberland is seised in fee of the manor of *Tynemouth*; that the places in which, &c. have immemorially been *copyhold tenement* of that manor; and that *by reason thereof* the Duke is intitled to all mines and veins of coal, in and under the said closes in which, &c., and to bore for, dig for, and get such mines and veins of coal. The second justification states that the Duke had the right above-mentioned *making and allowing to the copyhold tenants of the said closes in which, &c. and their tenants and occupiers thereof respectively, a reasonable satisfaction and compensation for all damages* done or occasioned to them respectively by such boring for, digging for, and getting such veins and seams of coal as aforesaid. To these two first justifications the plaintiff has demurred, and has assigned for cause, that the existence of the right (so claimed as aforesaid) is alleged, not as a fact, but as a consequence of law from the Duke's being seised of the manor. The third justification states that the places in which, &c. from time whereof, &c. have been copyhold tenements of the manor of *Tynemouth*; and that the Duke is *seised in fee of all the veins and seams of coal lying within and under the copyhold tenements* of the manor *together with the liberty of boring for, digging for, and getting such veins and seams of coal there, and of doing all acts necessary for those purposes*; and justifies under that right. The fourth is the same with the third, except that it adds that *compensation* is to be made for damages, as the second does. The 5th and 6th are like the 3d, and 4th; but they add that the Duke is also seised of the *manor*. To each of these four last justifications the plaintiff has replied, that as well the said veins and seams of coals lying under the said closes in which, &c., as the rest of the soil and ground of and within and under the said closes in which, &c., from time immemorial have been parcel of the said manor, and demised and demiseable by copy of court roll, *without any exception or reservation of the mines or seams of coal* within or under the said closes, in which, &c. or either of them, or any part thereof; that the said closes in which, &c. were granted to Sir *M. White Ridley* and *Charles Brandling Esq.*, to hold to them and their heirs, at the will of the lord, &c. and that they demised them to the plaintiff. To each of these replications the defendant has demurred, and has assigned for cause, that they do not directly traverse, or confess and avoid, any of the matters contained in the pleas, and are argumentative, and not issuable.

Upon these pleadings, therefore, there are two questions; the one, a general one, whether the lord of a manor has, as lord a right to enter upon the copyholds within the manor, if there be mines and veins of coals under them, and bore for and work such mines or veins? the other, a question of mere form, whether the replication to the last four justifications sufficiently confess and avoid them; or whether they ought not to have traversed the liberty of digging stated in the justifications?

As to the first, if such a right as is claimed exist, it is singular that it is not noticed in any of the books which treat of manors and copyholds; that it is now for the first time brought forward; that not a single instance is given of

the exercise of it; and that with a single exception of a dictum in *Rutland v. Greene*, what authorities there are upon the point are all against it. *Rutland v. Greene* is in 1 Keb. 557. 1 Sid. 152. and 1 Lev. 107. The case was this; a parson opened a mine upon his glebe: the patron moved for a prohibition to restrain him under the equity of the statute, 35 Ed. 1. st. 2. The court thought him entitled to open and work the mine; because, otherwise, none of the mines under glebe lands throughout *England* would be opened. But it being urged that this was the only way the patron had to try his right, the Court granted a rule. *Siderfin* adds, "the same law seems of a copyholder of inheritance. *Quære bien*." Whether this were his own conclusion, or collected from what fell from the Court, does not appear: but if any inference is to be drawn from it, it is, that the copyholder may open the mine, not the lord. *Levinz* says nothing as to lord or copyholder: but *Keble* says, "Twisden conceived the lord may open a mine in a copyhold of inheritance." *Foster* held it a trespass: and *Keeling* conceived he could not do it. The utmost extent therefore of this authority is, that there is the obiter dictum of one Judge, viz. *Twisden*, against the obiter dicta of two others, *Foster* and *Keeling*. In *The bishop of Winton v. Knight*, 1 P. Wms. 406. Lord Chancellor *Cowper* held, that if there were no custom to regulate it, neither a customary tenant, without licence from the lord, nor the lord without licence from the tenant, could open and work new mines. In that case a customary tenant of the manor had opened a copper mine, and the lord filed a bill against him to account for the produce. It being doubtful where there was not a custom which would protect the tenant, the Lord Chancellor directed the lord to bring an action of trover: but the custom appearing upon the trial not to be applicable, "the Court held, that neither the tenant, without the licence of the lord, nor the lord, without the consent of the tenant, could dig in these mines, being new mines." In *Player v. Roberts*, Sir W. Jones, 243, J. N. was copyholder for life: the lord granted all coal mines within his manor for 99 years to *Dimery*, who under let to *Player*; *Dimery's* term was afterwards surrendered to the lord, but *Player's* interest was not extinguished: the lord opened new pits upon the copyhold, and took away the coal; upon which *Player* brought trover against him. Several points were moved; and the last was this: a man grants all his coal and coal mines within a manor, (and parcel was copyhold for life,) to J. S.: the lessee (this should be the lessor) enters the copyhold, and digs a new pit in the copyhold land during the life of the copyholder, and takes the coals and converts them to his own use; and the lessee of the coal mine brings trover against the lessor: and, by the Court, so he may: for it is true, that neither the lessee nor the lessor can enter upon the copyholder to dig the coals; for the copyholder shall have trespass for breaking his close, and digging his coals. But when the lessor or lessee or a stranger enters, and digs the coals out of the pits, they belong to the lessee; and if any other take the coals, the lessee shall have trover: and upon the whole matter judgment was given for the plaintiff. In *Gilb. Ten.* 327, the Lord Chief Baron says, "It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines: neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate. Lastly, In *Townly v. Gibson*, 2 Term Rep. 704—707, it had been urged in argument that the lord of the manor was entitled to the mines under the copyholds, unless there were some custom to exclude him: and *Buller, J.* in delivering his opinion, said, "I do not agree with the defendant's counsel that the lord may, unless restrained by custom, dig for mines on the copyholder's lands: but it is not necessary to consider that question here." These authorities are in point; and though they are dicta only, not decisions, they are the dicta of great men, and they correspond with the usage on the subject. Valuable as the supposed right is, there is not a single instance shewn in which any lord has ventured to act upon it. The injury to the tenant would naturally have produced resistance on his part: the dicta abovementioned

would have encouraged that resistance: a suit would have been the consequence, and the result of such suit must have been known in *Westminster-hall*: and as none such is known, it may fairly be presumed that a litigation of that kind has not taken place.

The second question, whether the replications ought to have traversed the liberty of working the mines, as stated in the 3d and subsequent justifications, depends upon the construction to be put upon those justifications. If they mean only, that the liberty is so annexed to the seisin in fee, as that, until the right of *actual possession* has accrued in virtue of the seisin, the liberty cannot be exercised; the replications have sufficiently confessed and avoided it by shewing that there is an outstanding copyhold estate, which suspends the right of actual possession. But if the pleas are to be considered as claiming the liberty *presently*, i. e. *during the continuance of the copyhold estate*; that liberty is not confessed and avoided by the replications; and there ought to have been a traverse. The latter seems to be the true meaning of these pleas: and indeed the pleas would be bad if it were not: for they admit that the closes in which, &c. were *copyhold tenements at the time of the trespasses*, and insist upon the right to enter upon the copyholds. *The defendant says, all the mines under the copyholds are the Duke's, and the Duke has a right to work them: the closes in question were subsisting copyholds at the time of the trespass, and therefore I entered under the Duke's right. The defendant therefore must have meant that the Duke's right was such as entitled him to work *during the copyholder's estate*. The word *liberty* too implies the same thing. It imports, *ex vi termini*, that it is a privilege to be exercised over another man's estate. A man's right of dominion over his own estate is never called a *liberty*. Now during the continuance of the copyhold, if the mine is to be worked, the lord must exercise a privilege over the copyholder's estate: but as soon as the copyhold is at an end, the surface will be the lord's as well as the coal, and he will have to work upon nothing but his own property. It requires then no reasoning to prove, that if the pleas claim the liberty during the continuance of the copyholder's estate, a replication that the copyholds have always been demised, *without any exception or reservation* of the mines or seams of coal, is not a confession of the liberty and an avoidance of it, but a mere argumentative denial of its existence: and as this is assigned specially as a cause of demurrer, it should seem that the replications are bad on this ground, and that the plaintiff ought to have leave to amend, or that there should be judgment for the defendant.

The plaintiff's counsel then prayed leave to amend his replications; which was granted.

Doe, on the several Demises of Webber, and the Dean and Chapter of Exeter, v. Lord George Thynne and Others.

10 East, 206. July 4, 1808.

Upon a question whether certain ancient books, from 1586 to 1693, preserved in the archives of the dean and chapter of *Exeter*, intitled *Rentals*, and containing columns of the names of their estates, with the rents reserved on each, and *solvits* written in different hand-writings against such rents, were entries made by the receivers of the dean and chapter charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receivers' books, by shewing that the receivers of the dean and chapter for the last 60 years had kept their books of accounts in the same form. But it appearing that some of the entries in such books (though not the entries as to the rent of the estate in question) contained internal evidence of their being the books of receivers; by such entries as "*solvit mihi*," and "*solvit per me*." Signed with the initials *N. W.*; which entries imported that *N. W.* was therein accounting to the dean and chapter for money paid to himself, and with the receipt of which he debited himself; the Court directed a new trial, in order to have the inspection of the books again submitted to the Judge at Nisi Prius.

AT the trial of this ejectment for premises, called the *Denn*, in *East Teignmouth*, in the county of *Devon*, before *Thomson, B.*, the title was stated to be either in *Webber* under a purchase from the dean and chapter of *Exeter* in pursuance of the land-tax redemption act, or remaining in the dean and chapter. And in order to prove that the dean and chapter were in possession of the *Denn*, several ancient books, denominated on the outside *Rentals*, were produced from amongst the muniments of the dean and chapter out of their archives; some of them subsequent to the disabling statute of the 13 Eliz. c. 10, which appeared to contain entries of rent from time to time received by the dean and chapter in respect of the *Denn*. But it did not appear to the learned Judge that any of the books subsequent to that period purported to be the accounts of receivers charging themselves with these rents. The present receiver of the dean and chapter was then called on the part of the plaintiff to prove that he had held that office from 1803, and to produce his books, in order to shew, that he kept his accounts as receiver in the same form in which the entries in the old books were made: which evidence the learned Judge thought inadmissible to explain the ancient books, and therefore non-suited the plaintiff.

A new trial was moved for in the last term, when the general form of the entries was stated to be, so much due as rent for the *Denn*, (amongst other descriptions of property) and afterwards in a different hand-writing *solvit*, with a date, and in some instances *solvit in scaccario*; from which the lessors of the plaintiff wished to have inferred that it was the entry of the receiver charging himself; contending that the practice in modern times, as far back as living memory went, of keeping the books by the receivers of the dean and chapter, who had charged themselves in the same form, strengthened that inference. But at this distance of time it could not be told by whom those entries were made; and the books, it was admitted, came out of the possession of the dean and chapter; having been kept in their treasury, to which the receivers, it was said, had access. And in answer to a question by the Court as to the respective dates of the earliest and latest entries respecting the *Denn* in these books entitled *Rentals*; and how far back from the present time there was living evidence of the books having been kept in the same form by the receivers; it was answered, that the earliest date respecting the *Denn* was 1586, and the latest in 1693; and that there was evidence of the modern receivers having kept their books in the same form from 1746 to 1803.

Lens, Serjt., Courteney, and A. Buller, shewed cause in this term against

the rule, and contended against the admissibility of the evidence on the mere ground of probability that the books had been kept by receivers, who had thereby charged themselves with the receipt of the rents. They admitted, that it was not necessary in these cases where the entries were made at a distant time, to prove the hand-writing of the steward or receiver, which might be impossible to be done: but the evidence had never been let in, except where the books or papers purported on the face of them to be the accounts of such persons delivered in to their employers, and charging themselves with the receipt of money on their account; as in *Barry v. Bebbington*, 4 Term Rep. 514, and *Stead v. Heaton*, lb. 669. Whereas the books in question purporting to be *rentals*, which are documents of the property furnished by the owners themselves, or by their direction; and on that ground the like evidence was rejected in *Outram v. Morewood*, 5 Term Rep. 121, even as between third persons in a collateral inquiry: much less then can it be evidence for the owners themselves claiming the property. It does not at all appear but that the *solvits* may have been written by the different tenants, not to charge but to discharge themselves. The whole class of cases where receivers, accounts have been admitted is an exception to the strict rule against receiving in evidence the declarations (for these entries are no more) of facts by third persons; and therefore the rule ought not to be relaxed further than the cases have gone; which have only let in evidence of these documents purporting either from the general title, or upon the face of the entry itself in question, to have been made by a person charging himself to another, or admitting a fact against his own interest.

Pell, Serjt., *Dampier*, and *Harris*, in support of the rule; after contending that the parol evidence offered of the books having been kept by receivers for 60 years past in the same form was admissible to explain the manner in which the old books were kept; referred to the books themselves as containing internal evidence of their having been receiver's books. Some of them were entitled *debitu quæ debentur*; others *Rentals*: in which latter the *solvits* were entered. In the first column are the names of the several estates; in the 2d, the rents: in the 3d, the entries of *solvit* with different dates, or of the sums remaining unpaid: many of the *solvits* are in the same hand-writing as the books themselves; the rest in different hand-writings. In particular, they drew the attention of the Court to an entry in 1678, by which it appeared that part of the rent of an estate called *Branscombe* was first received, and the rest of the rent is afterwards entered as received in this form: "*solvit residuum mihi N. W.*;" and to another entry of "*solvit per me*," with the signature of the same person. These, they contended, must have been entries by some person in the character of a receiver, by reason of the words *mihi*, and *per me*, and by which that person charged himself with the receipt. And that this was strengthened by the consideration that these were the books of a corporation, which can only keep its books by the medium of some officer, who must at all events be responsible to the general body.

The Court desired to have an inspection of the books themselves, from whence they are called upon to infer the character of the persons by whom the entries were made; and the case stood over for further examination of them till the end of the term, when

Lord ELLENBOROUGH, C. J. said—The motion for a new trial in this case has been made on the ground of the refusal of the Judge to receive in evidence certain comparatively modern receivers' books, in order to lay a foundation for presuming, from a comparison between the two, that certain other ancient books, kept in the same manner, and containing like entries of receipts and payments, were also receivers' books, and entitled to be read in evidence as such. We are of opinion, that the similitude which appears upon the entries to exist between the ancient and modern books does not lay a safe and adequate ground for presuming that, because the later books are known and

can be proved to have been kept by receivers of the dean and chapter of *Ezzer*, and accounted upon as such, therefore the former books were kept by persons of the same description and character, and made and used for the like purpose. We therefore cannot grant a new trial for the rejection of the evidence offered for this purpose, upon the ground on which it has been prayed. But inasmuch as upon inspection of the original ancient books, we think they do contain very strong *internal* evidence of their actually being receivers' books; the language of several entries importing that one *Nicholas Webber* was therein accounting to the dean and chapter for money paid to himself, and with the receipt of which he therein debits himself; such as "*solvit mihi*," "*solvit per me*:" We are of opinion that it is fit that a new trial should be granted, for the purpose of submitting the quality and character of these books, and the question of their admissibility as receivers' books, again to the consideration of the Judge, upon a further inspection of the contents of the same.

The King v. Hawkins.

10 East, 211. July 5, 1806.

One who has not taken the sacrament within a year, being incapable of being elected into a corporate office by stat. 18 Car. 2. c. 12, his disqualification was held not to be removed by the annual act of indemnity (47 G. 3, st. 2. c. 86.) the 6th section of which restrains its operation in cases where the office shall have been "already legally filled up and enjoyed by any other person," at the time of passing the act; the fact being that the defendant and another were candidates at the time of election, when 40 electors were assembled; and after 2 electors had voted for each candidate, the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidate in the affirmative; whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all, who afterwards voted for the defendant, being 20 in number, except 2 or 3; and 16 afterwards voted for the other. Held,

1. That all the votes given for the defendant after such notice were thrown away.
2. That the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes (not being equal in number to the good votes ultimately given for the other) had voted before such notice.
3. That the presumption of law being that every person has conformed to the law till something appears to rebut that presumption; it must be taken that the other candidate, who affirmed his qualification, which was not negatived by the jury, was duly qualified; and that such his election, perfected by swearing in, was a *filling up and enjoying* by him of the office, within the proviso of the indemnity act, so as to preclude its operation by relation in favour of the defendant.

THIS was an information in the nature of a *quo warranto*, calling upon the defendant to shew by what authority he claimed to be an alderman of the borough of *Saltash*: to which the defendant pleaded, setting out the constitution of the borough under the charter of the 14 Geo. 3. which constituted seven aldermen, one of whom was to be mayor and another justice of the peace, and an indefinite number of free burgesses: and ordained that when any of the aldermen should die or be removed from their offices, the mayor, justice of peace, and the rest of the aldermen and free burgesses, or the major part of them, should elect one of the free burgesses inhabitants of the borough to supply the vacancy; and that the person so elected should hold the office of alderman for life unless removed; he first taking his oath before the mayor, or justice of the peace, or two or more aldermen, or, in default of these, before four or more free burgesses inhabitants, well and truly to execute his office, &c. The plea then stated the acceptance of the charter, and that afterwards, on the 6th of November 1806, *R. Thomas*, an alderman, died; and that on the 18th of December 1806, the mayor, justice of peace, and the four other aldermen duly assembled at the Guildhall to elect an alderman in his room, and did elect the defendant, then being a free burgess and inhabi-

tant of the borough, to be an alderman, who was in due manner sworn in before the mayor; and so he made title to the office. The replication, admitting the due assembly of the corporation to make an election, took several issues, 1. That the defendant was not duly elected at that assembly. 2. That he did not duly take the oath of office before the mayor, and 3. that he was not duly sworn into the office: and on issues joined, a special verdict was found stating; that on the 18th of *December* 1806, the place of one of the aldermen of the borough being vacant, the mayor, justice of the peace, and the rest of the aldermen, and 34 of the free burgesses, assembled in the Guildhall of the borough on due notice, in obedience to a writ of mandamus from *B. R.*, commanding them to proceed to the electing and swearing in of an alderman in the place of *R. Thomas* deceased. That at that assembly the defendant and *Peter Spicer*, being free burgesses inhabitants of the borough, were proposed as candidates. That after two voters had voted for the defendant, and two other voters for *P. Spicer*, and before any other person had voted or offered to vote for the defendant or *Spicer*, *C. Carpenter* as agent for *Spicer* asked *Spicer* whether he had taken the sacrament within a year; to which *Spicer* answered that he had; but no other evidence of this fact was given to the jury. *Carpenter* then put the same question to the defendant, who answered that he had not. Whereupon *Carpenter* notified and declared to the mayor, justice of the peace, aldermen, and free burgesses so assembled, and in their hearing, that the defendant was on that account ineligible, and incapable to be elected an alderman; and that if any voter should after that notification give his vote for the defendant, such vote would be thrown away and void. And *Carpenter* then and there publicly read the 12th section of the stat. 13 Car. 2. c. 12. After which 20 voters voted for the defendant, all of whom except 2 or 3 were present when the notification of the ineligibility of the defendant was made, and heard the same: and 16 voters voted for *Spicer*. That the defendant was thereupon sworn in by the mayor, and took the usual oaths. That *S. Drew* one of the aldermen, in the hearing of the mayor, justice, aldermen, and free burgesses so assembled, declared that *P. Spicer* was duly elected alderman; and *Spicer* was also thereupon tendered to the mayor to be sworn in, and offered to take the usual oaths. But the mayor refused to swear him in: whereupon he was sworn in by *Drew* and *Gaborian*, two of the aldermen. That the defendant had not taken the sacrament according to the rights of the church of *England* within a year before the election; but he took it afterwards on *Sunday* the 4th of *October* 1807. But whether the defendant were duly elected an alderman, or duly took his oath of office before the mayor, or was duly sworn into the office, the jurors pray the advice of the court, and find the issues accordingly.

This case was argued on two former days in this term, by *Adam jun.* for the prosecution, and *A. Buller* for the defendant: but as all the points made and authorities cited were fully noticed by the Court in delivering their judgment it is unnecessary to repeat them.

Lord ELLENBOROUGH, C. J. on this day delivered judgment. This was an information in nature of a *quo warranto*, to know by what authority the defendant, *Edward Hawkins*, claimed to be an alderman of the borough of *Sal-tash*. The defendant, by his plea, states the charter of the 7th of *June* 14 Geo. 3., which directs the election of aldermen to be made in the following manner: That whenever it shall happen that any of the aldermen of the said borough for the time being shall die, or be amoved from their offices, then and so often, it shall be lawful for the mayor, justice of peace, and the rest of the aldermen and free burgesses of the said borough, for the time being, or the major part of them, to elect or prefer one or more of the free burgesses, inhabitants of the said borough, alderman or aldermen, to fill up the number of seven aldermen of the said borough; and that the person or persons so elected should hold the office for life, or until amoved; he or they so

elected first taking his or their corporeal oath or oaths before the mayor, or justice of the peace of the borough, for the time being, or two or more of the aldermen of the said borough, or in default of the mayor, justice, or aldermen, but not otherwise, before four or more free burgesses inhabitants of the said borough. That on a vacancy of an alderman by the death of *Richard Thomas*, the mayor, justice of peace, and four aldermen, being the rest of the aldermen, and divers of the free burgesses, duly assembled on the 18 December 1806, at the Guildhall in the said borough, and did then elect the defendant, being a free burgess and inhabitant, to be alderman in the room of the said *Thomas*; and that after his election, and before he took on himself the office, he was duly sworn before the mayor. The replication to this plea puts in issue first his election, in manner and form as stated: secondly, his taking in due manner his corporeal oath before the said mayor: thirdly, his being duly sworn into the office. On these issues the jury find a special verdict. [Then after stating the facts found by the jury, his Lordship proceeded—]

On this state of facts it is clear, that at the time of the election, namely, on the 18th of December 1806, the defendant *Hawkins* was incapable of being elected into the office of alderman of the borough by the express prohibition of the stat. 13 Car. 2.; it having been admitted by himself at the time, and it being now stated as a fact by the special verdict, that he had not taken the sacrament withip a year next before such day of election. But he founds his right to retain the office on the subsequent indemnifying act of the 47th of the king; he having since qualified himself by taking the sacrament withip the time for that purpose limited by such act; whereby he is discharged from all disabilities and incapacities before incurred, and is recapacitated and restored to the same state and condition as he was in before such neglect and omission in the most ample manner; subject to the proviso in the 6th section of the act(a), which is "that this act or any thing herein contained, shall not extend or be construed to extend to restore or entitle any person to any office or employment, benefit, matter, or thing whatsoever, already actually avoided by judgment of any of his majesty's courts of record, or already legally filled up and enjoyed by any other person; but that such office or employment, benefice, matter or thing so avoided, or legally filled up and enjoyed, shall be and remain in and to the person who is now, or shall at the passing of this act be, legally entitled to the same, as if this act had never been made:" and this brings it to the questions of *Spicer's* election: for if the office or place of alderman of this borough were legally filled up and enjoyed by *Spicer*, then the present defendant is not entitled to the benefit of this indemnifying or recapacitating statute. As to *Spicer's* qualification or capacity to be elected, we must take it that he was duly qualified by having taken the sacrament within a year; on the question put to him at the time, he declared that he had done so, and such allegation is not negatived by the verdict: and according to the authorities alluded to in the argument, viz. *Powell v. Milbanke*, 3 Wils. 366, and 2 Blac. Rep. 852, *Williams v. The East India Company*, 3 East, 192, and *Monk v. Butler*(b), the presumption that every man has conformed to the law, shall stand till something shall appear to shake that presumption. Was he, *Spicer*, then duly elected on the 10th December 1806? That question depends on the effect of the notice given to the electors of the incapacity of the other candidate *Hawkins* to be elected. There is no objection to the due holding of the assembly to elect: 40 persons duly qualified to vote are stated to have been present: viz. the mayor, the justice, four aldermen, and 34 free burgesses; *Hawkins* and *Spicer* are proposed as candidates; and after two persons had voted for *Hawkins*, and

(a) 47 G. 3. st. 2. c. 35. s. 6, which is the same as sect. 5, in the stat. 42 G. 3. c. 23, in the last edition of the printed Statutes.

(b) 1 Rol. Rep. 83, and vide *Dr. Harscot's case*, Comb. 202.

two for *Spicer*, notice is given of the fact creating *Hawkins'* incapacity (which fact he at the time himself acknowledges,) and that all votes given for him after that notice would be void and thrown away, and the incapacitating clause of the statute of Car. 2. is publicly read: and all this is found to have been in the presence and hearing of all who afterwards voted for *Hawkins*, except two or three. After this notice, 20 persons voted for *Hawkins*, and 16 for *Spicer*; these numbers, with the two votes before given to each of the candidates, making up the full number of 40. If the law be, that at the election of corporate officers, the votes given for an incapable candidate, after notice of such incapacity, are to be considered as thrown away, i. e., as if the voters had not given any vote at all; then this will be a good election of *Spicer*; unless the time when notice of his incapacity was given, namely, after two persons had given their votes for each of the candidates, can be considered as making any difference. The general proposition that votes given for a candidate, after notice of his being ineligible, are to be considered the same as if the persons had not voted at all, is supported by the cases of *The Queen v. Boscawen*, Easter, 13 Anne, *The King v. Withers*, Easter, 8 G. 2. *Taylor v. Mayor of Bath*, M. 15 G. 2., all which are cited in Cowper 537, in the *King v. Munday*. In the first, *Boscawen* and *Roberts*, the two candidates had an equal number of votes; but because *Boscawen* was incapable, the votes given for him were considered as thrown away, and the other duly elected. In the second case, *Withers* had 5 votes out of 11; and the other six refusing to vote at all, the Court held *Withers* duly elected; and that the six who refused to vote were virtually consenting to the election of *Withers*. In the third case, *Taylor*, *Bigg* and *Kingston*, were candidates: *Bigg* was objected to as a disqualified person: notwithstanding which, *Bigg* had 14 votes, *Taylor* 13, and *Kingston* only 1. There Lord Chief Justice *Lee* at *Nisi Prius*, directed the jury, that if they were satisfied that the electors had notice of *Bigg's* want of qualification, they should find for the plaintiff; (that was *Taylor*, who had only 13 votes;) because *Bigg* not being qualified was to be considered as a person not *in esse*, and the voting for him a mere nullity. The jury found for the plaintiff; and the Court, on motion for a new trial, agreed with the law as laid down by Lord Chief Justice *Lee*, and refused a new trial. And in *The King v. Munday* in Cowper and *The King v. Coe*, in the 27th of the present king, Hil. Term, this doctrine was not denied; although the cases then before the Court went off on other points. Is there then any solid distinction between the cases I have alluded to, as establishing the general proposition, and the present case, on account of the notice of the disqualification of *Hawkins* having been given after two persons had voted? We think there is not: there still remained 36 persons to vote, of whom 16 only voted for *Spicer* and 20 for *Hawkins*: although we are not prepared to say, that if the notice had been given in a more advanced stage of the poll, it would have made any difference, provided the number of votes given for *Hawkins* without notice of his incapacity had not been equal to those given for *Spicer*. *Spicer* having been therefore in our opinion duly elected into the office of alderman, and having been sworn in before two of the aldermen who have by the charter authority to administer the oaths, the office was legally filled up and enjoyed by him; for we know not of any other enjoyment of such office, except being duly elected, accepting the office, and being sworn in. Under these circumstances, we think the defendant *Hawkins* is excluded from the benefit of the indemnifying act of the 47th of the king, by the proviso contained in the 6th section; and that in consequence there must, on this special verdict, be judgment for the crown.

The King v. The Inhabitants of Mirfield.

10 East, 219. July 5, 1808.

Salable under-woods are rateable annually to the relief of the poor within the construction of the stat. 43 Eliz. c. 2. in proportion to their value, though they should happen not to be cut down more than once in 21 years : and their annual value may be estimated amongst other ways, according to the value they may be worth to rent for a lease of the duration of their intended growth.

R. H. BEAUMONT appealed against a rate for the relief of the poor of the township of *Mirfield*, in the West-Riding of *Yorkshire*, for certain under-woods in that township : and the sessions quashed the rate, and stated specially, that the woods for which the appellant was rated are certain under-woods in *Mirfield*, which are usually sold and cut down once in 21 years ; and when so sold and cut down produce actual profit to the appellant, and not before. That, these underwoods have not been cut down and sold for 10 years past, but are now standing to complete 21 years growth. That by an act of the 36th Geo. 3. for dividing and inclosing the commons within the parish of *Mirfield*, it was enacted, that " all woods within the said parish of or above 14 years growth since the last fall shall be titheable, and liable to the payment of tithes at the next fall thereof, but no longer : yet that all such woods shall continue liable to rates and assessments annually, in like manner as they have heretofore been, notwithstanding any thing herein contained to the contrary." And the Sessions submitted to this Court, Whether the woods are *saleable underwoods* within the meaning of the stat. 43 Eliz. c. 2. and liable to be rated every year, according to the annual average thereof, or only when cut down and sold, and therefore then only producing actual profit.

Topping, Lambe, and Christian, in support of the order of sessions, (after laying out of the case the private act of Parliament referred to, which it was admitted on all hands had no bearing upon the question,) contended, that underwoods cut periodically, as these are stated to be, are not rateable within the words and meaning of the stat. 43 Eliz. c. 2. except in the years when they are cut for sale, in which state only they can be deemed "*saleable underwoods*." In order to make any species of property annually rateable, the property itself must produce profit within the year though the actual occupier need not derive that profit ; as if it be absorbed in his rent : and therefore where a coal mine, becoming unproductive, ceased to be worked altogether ; though the occupier was still bound by his covenant to pay the rent reserved ; it was held not to be rateable. *Rex v. The Inhabitants of Bedworth*, 8 East, 387. If the legislature had meant that underwoods in the progress of their growth should be rateable according to their average annual value, there would have been no occasion to introduce the word *saleable*, and such a construction will make it nugatory. But that word is significant, and was introduced from the necessity of the case, which requires that the subject should only be rateable when it is in a state capable of yielding profit to the occupier : *saleable* was used rather than *sold* ; because the owner might choose to use it for his own purposes ; and it means when the underwood is in a fit state to be sold, according to the mode of husbandry there used. Where underwoods are extensive, a certain proportion is usually cut every year, and no difficulty can occur in rating it : but where those in the same occupation are by the custom of the country cut at the end of a stated number of years, it would be extremely oppressive to tax the actual occupier for that which he may never enjoy. It would be hard that a tenant for life in possession, who would be restrained from cutting before the proper time, should be obliged to pay rates for a property wholly unproductive to him at the time, and which he might probably never enjoy. Till the underwoods are actually cut, the

occupier is not furnished with the means of paying the rate, which the law contemplates is to be levied out of the subject matter of it. He has no ability to pay, unless he chance to have other property. No distress could be levied upon the wood while standing. Besides, how can it be told beforehand, whether any or what proportion of it will be cut before it has become timber, in which state it is not rateable at all. The owner is not obliged to decide beforehand. It will be equally difficult to ascertain what is the average annual value of property which is not to be sold for 20 years to come; as it must depend upon the state of the market at that time. In *Rowls v. Gell*, Cowp. 452, 3, Lord Mansfield considered the poor's rate as a personal charge by reason of the *annual profits* out of the land.

Holroyd, contra. The legislature meant, that all visible property from whence profit was derived at stated periods should contribute its proportion to the maintenance of the poor: amongst others, *underwoods* are expressly named; and the introduction of the word *saleable*, importing, as applied to the subject matter, that which is generally grown and adapted for sale according to the custom of the country, might be in contradistinction to underwood casually applied to the purposes of the farm. The subject matter is of annual growth, and is still continually increasing in value; and the average annual value of this, as of every other species of productive property, is easily ascertainable, by calculating what it would be worth at the time, with a restriction of cutting it till a certain period. And there is in fact an annual increase of profit, if the owner choose to avail himself of it; and it may be in general presumed that he only suffers it to continue its growth for several years more or less, because he finds that to be a more beneficial mode of enjoying it than by annual cuttings. In the mean time his ability is increased by the increase of its value. No inconvenience can ensue to tenants for terms of years: for they will make their bargains with the owners of the inheritance accordingly; and to those owners it must be the same thing. Nor will any injustice be done to tenants for lives to whom this mode of rating may be as beneficial on the one hand, as burthensome on the other, and who must take their estate *cum onere*: and with respect to the parish at large, there can be no question that it must be more beneficial to have the burthen fall as equally in every year as it can be. Whatever inconveniences there may be from this mode of rating arise unavoidably out of the subject matter. Corn is an annual product, and is in fact only productive when cut down: and yet if a rate were made weekly or monthly, as it may be, the occupier must be rated for his corn field *pro rata*; and it would be no answer to say, that it had not as yet produced him any profit, or that he should give up the occupation of it before harvest. Then, what difference is there in principle between the case of corn and underwood?

Lord ELLENBOROUGH, C. J. In general the owners of this kind of property are in the habit of cutting certain proportions of it every year: but where the extent of it is too small to adopt this course, there may be a difficulty in rating it annually. There is great difficulty however on the other hand, in attaining any thing like equality by adopting a different mode of rating; for if the property is only to be rated when it is cut once in 21 years; instead of its quota of the rate contributing equally through the whole period, it throws a glut into the fund in that one year, and is barren all the rest of the period: and if the owner has other property in the parish he will pay so much less for that in the same year when his ability is increased. However as it is a case of extensive consequence we will consider further of it. Near the end of the term his Lordship delivered the opinion of the Court.

This was an appeal against a poor rate for the parish of *Mirfield*, in which the appellant, *Henry Beaumont*, Esq. was rated for some underwoods. The underwoods were such as are usually cut down once in 21 years, and in the year they are cut they produce profit, but in other years they are stated as producing none. At the time of the rate they were of 10 years standing. The

sessions thought them not rateable, and therefore quashed the rate; but submitted the question to this court, whether they were liable to be rated every year according to the annual average value thereof; or whether they should be rated *then* only when they are cut down, and produce actual profit. Among the several descriptions of persons whom the statute 43 Eliz. c. 2, makes rateable, the occupier of *saleable underwoods* is one: and the question is, whether they can be deemed *saleable* underwoods, except in the year in which they are cut down. The word *saleable* has not a very precise definite meaning; it may mean when they are in a fit state for sale, referring to the time when they are cut; or it may mean such as are intended or destined for sale, in contra-distinction to such as are to supply the land with estovers for fuel and the other purposes of the estate. In the former of these cases, they would only be rateable in the year in which they are cut: in the latter, they would be rateable at all times: and we think, after full consideration of the subject, that the latter is the proper meaning. If they are rateable at all times, they will contribute, according to their value, in exact proportion with the rest of the property in the parish: but if they are rateable in that year only in which they are cut, the sum they will have to contribute may materially vary, according to the proportion their value bears in that year to the rateable property of the rest of the parish, and may be much greater or much less than the aggregate sum it would pay if it were rateable at all times. Suppose the underwoods in the year they are cut would produce a clear 1000*l.*; that the sum to be raised in the parish *communibus annis* is 100*l.*; and that the annual value of the rest of the property in the parish is 980*l.*: if the underwoods be rated at 20*l.* a year, which may be the rent they would produce upon a 21 years lease, the rates would amount to 2*s.* in the pound, and the underwoods would contribute annually 40*s.* If they were rated only in the year they were cut, a shilling rate would then be sufficient, and they would contribute rather more than 50*l.* So far there would be no injustice. But suppose the rest of the parish to be worth 10,000*l.*, the underwoods would, supposing them before to be rated at 20*l.*, contribute annually about 4*s.*; whereas if rated in the year of cutting, they would contribute in the proportion which 1000*l.* bears to 10,000*l.* that is the 11th part of the whole rate of 100*l.* which in money is 9*l.* and a fraction. As 50*l.* then is only 25 times 40*s.* and 9*l.* is 45 times 4*s.*, the disproportion in the two cases put is obvious, and the difference to all parties, whether the rating be annual, or in the cutting year only, considerable. Again, suppose the annual value of the parish 6000*l.*, and the annual sum to be raised still 100*l.*, the rates will be 4*d.* in the pound, and the underwoods will pay annually 6*s.* 8*d.* upon their same supposed annual value of 20*l.*, whereas if they paid in the cutting year only, they would pay 14*l.* 5*s.* 8*d.* which is above 42 times 6*s.* 8*d.* Put the annual value of the parish at 500*l.*; the rates to raise 100*l.* must be 4*s.* in the pound; but in the cutting year they would only be 1*s.* 4*d.* The underwoods would contribute in ordinary years, upon the last mentioned assumption of annual value of the rateable property in the parish, 4*l.* annually: whereas in the cutting year they would contribute little less than 20 times that sum, viz. 75*l.* It is hardly necessary to state that a mode of rating which might produce such differences to the owner of this description of property, and to the parish, if he contributed only in the cutting year, cannot be the true rule; and the only other rule is a constant contribution, which will at all times fall equally upon this and every other species of property. The objection to this, in argument, is, that the property ought not to be rated until the produce of it has been severed from the land, and until it has supplied the occupier with the means of paying. But we are of opinion that it is not necessary that any of the profits should have been actually reaped or taken from the property during the period for which the rate is made; but that the property is at all times rateable according to the improvement in its value, or in the rent which might

fairly be expected from it. Instances continually occur in which the occupier is rated, though he has derived no profit during the period for which the rate is made. A new tenant upon an arable farm reaps none of the produce till the autumn after his tenancy commenced, and yet he must pay up to that autumn according to the rent or value of the estate. He must pay before hand for the future probable produce. His farm is constantly in a progressive state towards producing profit; and he pays for that progress. So underwoods are annually improving in value, and the rates the occupier pays are for that improvement. This may possibly be hard upon tenants for life; but if the law have thrown this burthen upon the property, they take it with that burthen. We think, for the reasons we have mentioned, that the law has so thrown it; that the property is at all times liable to be rated whenever rates are made; and consequently, that the order of sessions ought to be quashed, and the rate confirmed.

Robinson v. Lewis.

10 East, 227. July. 6, 1808.

Where notice of pulling down and rebuilding a party-wall was given under the building act 14 G. 3. c. 78, and the tenant of the adjoining house, who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house giving notice, in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same: held that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance; all the powers and authorities given by the act in respect of any works to be done, being given to the owner of the house intended to be pulled down and rebuilt: and the land lord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house.

THE Plaintiff declared in *assumpsit* for money paid, laid out and expended by him for the defendant's use, and on the other money counts. The defendant pleaded the general issue, and paid 76*l.* 2*s.* into court. And at the trial before Lord *Ellenborough*, C. J. at the sittings, a verdict was found for the plaintiff for 194*l.* 14*s.* 2*d.* beyond the money paid into court, subject to the opinion of the Court on the following case. The plaintiff was tenant to the defendant of a freehold messuage in *Little Queen Street, Lincoln's Inn Fields*, and held the same by lease dated the 19th of *February* 1781, from *T. Lewis*, father of the defendant, to one *J. Savage*, for 31 years, at the yearly rent of 36*l.*: in which *Savage* covenanted to repair the premises during the term, with all manner of needful and necessary reparations and amendments whatsoever; (casualties by fire only excepted). The grantor died in 1803, and the reversion descended to the defendant. And *Savage* on the 12th of *February* 1794, assigned his interest to the plaintiff, who entered, and is now possessed under the said lease. On the 21st of *June* 1804, the plaintiff was served with the following notice, on behalf of the occupier of the adjoining house, which was in a ruinous state, viz. "To the landlord head owner or occupier, or whom else it may concern, of the house and premises, situate and being No. 29, *Little Queen Street Lincoln's Inn Fields*; please to take notice, that I shall sell the materials of the house and premises No. 28, &c. on the 25th of *June* 1804, and the same will be begun to be pulled down on the 26th of *June* 1804: therefore you will please to shore up or otherwise secure your premises, that no damage may ensue, to prevent any suit at law or in equity. Signed, *T. Ellis* 21st of *June* 1804." The plaintiff immediately served a copy thereof on the defendant. The adjoining house was agreeable to such notice taken down, and the party-wall being found ruinous, the plaintiff was regularly served with the

notices required under the act 14 Geo. 3. s. 78., which he from time to time communicated to the defendant; and no notice being taken thereof, four surveyors were regularly appointed under the act, and the party-wall was duly condemned by them as ruinous; and they certified the same under their hands on the 21st of *March* 1805: and that the party-wall ought to be taken down and rebuilt. And this certificate was filed by the clerk of the peace for the county of *Middlesex* on the 22d of *March* 1805. The plaintiff was regularly served with this condemnation on the date of it; and on the same day sent a copy thereof to the defendant who declined to take any part in the business, conceiving himself not liable to the expence(a). The wall was in consequence pulled down and rebuilt by *T. Wilson*, the then proprietor of the adjoining house, and on the 28th of *December* 1805, the plaintiff was regularly served with the following estimate, accompanied with a demand of payment on pain of legal measures to enforce it.

Mr *Geo. Robinson*, Dr. to *T. Wilson*.
For the half of the north party-wall and chimneys to his house in *Little Queen Street*.

5 rods, 75 feet, reduced brick, at 14 <i>l</i> .	£.73 17 <i>s</i> . 2 <i>d</i> .
19 feet run plaintile creasing, at 3 <i>d</i> .	0 4 9
6 chimney pots and plaintile flaunches, 7 <i>s</i> . 6 <i>d</i> .	2 5 0
19 double loads rubbish carted away, 5 <i>s</i> . 6 <i>d</i> .	5 4 6
Paid district surveyor his fee	1 1 0
	<hr/>
	£. 82 12 6

Contra Cr.

4 rods old brick work, 50 <i>s</i> .	10 0 0
	<hr/>

£.72 12 6

Measured, *November* 1805.

Edw. Mawley.

The plaintiff paid *Wilson* 70*l*. 9*s*. 6*d*. to which the bill was reduced by a surveyor, and also 5*l*. 12*s*. 6*d*. for the surveyor's charge; which several sums were regularly ascertained in pursuance of the said act, and which money the defendant has paid into court. Upon the occasion of pulling down the party-wall, it became necessary to shore up the plaintiff's house, and to pull down, rebuild, and reinstate some of the wainscots and partitions therein, which were done by the direction of the plaintiff, and not by *Wilson* or his workmen: and the plaintiff, to avoid being sued by the workmen he had so employed, paid for the same the further sum of 194*l*. 14*s*. 2*d*., beyond what is paid into court; which were *reasonable charges* of so shoring up the house, and pulling down and reinstating the wainscots and partitions: but the same was never submitted to the surveyors or to any other, nor was any account thereof ever taken by the builder of the said wall, or left by him at the plaintiff's or defendants house; but the same were before this action was commenced communicated by the plaintiff to, and demanded of the defendant, with an offer to have them examined, but the defendant, conceiving himself not liable, declined any interference in the business. That the money paid into Court is the amount of the reduced estimate to 70*l*. 9*s*. 6*d*., and the 5*l*. 12*s*. 6*d*. the surveyor's charge, and the verdict is found for the 194*l*. 14*s*. 2*d*. the extra expences above mentioned. The question for the opinion of the Court was, whether the plaintiff were entitled to recover the 194*l*. 4*s*. 2*d*. the expences so paid by him for shoring up the house occupied by him, and pulling down and reinstating the wainscots and partitions. If he were, the verdict was to stand: if not a verdict was to be entered for the defendant.

The st. 14 G. 3. c. 78. s. 38. provides, that every owner of a house who shall think it necessary to pull down and rebuild any party-wall, in case the

(a) The defendant, it was said, was a middleman, whose term had not many years to run.

owner of the adjoining house will not agree touching the same, shall give 3 months notice in writing to the owner if known, or otherwise to the occupier of such adjoining house, of such his intention, by delivering a copy of such notice, &c. (in which notice is given of the intention of having the party-wall surveyed, naming his surveyors, and the time of attendance, and requiring the other owner to appoint two other surveyors to meet them at the appointed time and place to certify the state and condition of the party-wall, &c.): and that every such owner or occupier of the adjoining house shall appoint two surveyors to meet the other surveyors to view and certify, &c.; or in default of such nomination, the party giving the notice shall name two other surveyors to meet those named in the notice, who are to meet, view, and certify the same to the justices at the quarter sessions, &c. And if the majority of the surveyors certify that the party-wall ought to be repaired or pulled down, a copy of their certificate is to be delivered to the owner or occupier of the adjoining house, and filed with the clerk of the peace; and an appeal is given to such owner, &c. And if there be no appeal, or the certificate be confirmed on appeal, the party giving the notice may, in 14 days after delivering a copy of such certificate as therein mentioned, pull down and rebuild the party-wall, and enter the adjoining house, and remove the wainscot, furniture, &c., and shore up the house, and rebuild the party-wall, &c. And section 41 directs how the expences of the party so rebuilding are to be reimbursed by the owner of the adjoining house: and particularly, that the owner or occupier of the adjoining house shall, together with a proportional part of the expence of building the party-wall, "also pay a proportional part of all other expences which shall be necessary to the pulling down the old party-wall, &c.; and the whole of all the reasonable expences of shoring up such adjoining house, and of removing any goods, furniture, or other things, and of pulling down any wainscot or partition, and also all costs, if any, awarded by the sessions, &c." It then directs, that within ten days, &c. after such party-wall shall be so built, such first builder shall leave at such adjoining house a true account in writing of so much thereof for which the owner of such adjoining house shall be liable to pay, and also an account of such other expences and costs; "whereupon it shall be lawful for the tenant or occupier of such adjoining building to pay such proportional part as aforesaid to such first builder, *and also for shoring* such adjoining building, and for all such other expences as are herein before directed to be paid by the owner of such adjoining building, and to deduct the same out of his rent, &c., until he shall be reimbursed." And if the expences be not paid within 21 days after demand, a remedy is given against the owner by action of debt, or on the case.

The case was argued in last *Michaelmas* term, by *Holroyd* for the plaintiff, and *Wigley* for the defendant; when it was insisted for the defendant, that the tenant, being bound by his covenant to make all repairs, could recover nothing against his landlord, except that which he had been compelled to pay under the express provisions of the act above mentioned; and that the course there pointed out not having been pursued here, but the plaintiff having voluntarily incurred the expenses sought to be recovered, he had no remedy over against his landlord.

On the other hand, it was contended for the plaintiff, that as he would have been protected by the act in paying to the first builder the expences of shoring up and pulling down and reinstating the wainscot and partitions, which are found to have been necessarily incurred, if the same had been first paid, and afterwards demanded, by such first builder of him, the tenant; it could not make any difference as to his remedy over against his landlord, that he had paid these expences himself in the first instance. That the inconvenience to a lessee would be very great if he were obliged to entrust the workmen employed by the owner of the next house, to enter his premises and remove all

his furniture and stock in trade, instead of having it done by persons employed by himself, when the necessity of doing it at all was imposed upon him by the regulations of the act. That the act only meant to give the power of doing these things to the owner of the house meant to be repaired, where the owner or tenant of the adjoining house would not take it upon himself. That all the expenses necessarily attendant upon the pulling down and replacing the party wall, such as the removing and replacing of the wainscot and partitions, were also intended to be thrown on the landlord. As in *Hide v. Cogan* and others, Dougl. 699, the hundred was held liable for furniture destroyed by rioters in pulling down a house, as well as for the damage done to the house itself, though the latter only is named in the statute 1 G. 1, st. 2, c. 5, s. 6. And upon the construction of the building act, the cases of *Southall v. Leadbeater*, 3 Term Rep. 458, *Beardmore v. Fox*, 8 Term Rep. 214, *Barrett v. The Duke of Bedford*, Id. 602, and *Sangster v. Birkhead*, 1 Bos. & Pull. 303, were referred to: and it was insisted, upon the authority of the latter, that the operation of the statute was not varied by a covenant for repairs on the part of the tenant. The case stood over for consideration till this term, when

Lord ELLENBOROUGH, C. J. delivered judgment. The money sought to be recovered in this action is the expence of shoring up the plaintiff's house, which work was done by a workman employed by the plaintiff for that purpose, and the money paid by the plaintiff to such workman. This is an expence which properly belonged to the plaintiff, except so far as the stat. 14 G. 3, c. 78, has shifted the burden; because the plaintiff was tenant under covenant by the terms of his lease to repair, uphold and support the demised premises: and the defendant, the landlord, is no further or otherwise liable to this expence than as the act of parliament has made him so: the rule and manner of his liability must therefore be found in the act. Now the act empowers the person at whose expence a party-wall is rebuilt, in other words the owner of the house adjoined to his, pursuing the directions, and giving the notices, pointed out therein, to shore up the house and build the party-wall; and after the expence has been ascertained by surveyors in the manner pointed out by the act, to leave a true account in writing at the adjoining house: whereupon the act directs that it shall be lawful for the tenant or occupier of the adjoining building or ground to pay one third, or such proportional part of building the wall as aforesaid, and also for shoring and supporting such adjoining building, and such other expences as are directed to be paid by the owner, and to deduct the same out of the rent which shall become due from him to such owner under whom he holds the same, until he shall be reimbursed; and in case the same be not paid within 21 days next after demand thereof, then that the same may be recovered with full costs of suit of such owner, by action of debt or on the case. All the powers and authorities given by this act, in respect to any works to be done, are given to the owner of the house intended to be pulled down and rebuilt, and the money is to be paid by him; and it is only in the event of the money for doing such works having been paid to him by the tenant, that such tenant can reimburse himself as against his landlord. This being therefore an expence incurred by the tenant by his own act, and not in pursuance of the provisions of the statute, cannot be recovered against the defendant his landlord.

His Lordship added, that Mr. Justice *Lawrence*, who sat in this Court when the case was argued, concurred in this opinion.

Postea to the defendant.

The King v. Lucas and Another.

10 East, 285. July 6, 1808.

One who has a *prima facie* title to a copyhold is entitled to inspect the court-rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time.

DAMPIER obtained a rule calling upon the lord and the steward of the several manors of *Filby* in *Norfolk* to shew cause why a *mandamus* should not issue, commanding them to permit Mr. *Searle*, who claimed certain copyhold lands within these manors, to inspect the Court rolls, and to take copies thereof. This was obtained upon an affidavit setting forth Mr. *Searle's* claim as grandson and heir at law of the copyholder last seised, who died in 1774, having first devised certain estates for life and in tail, which were spent, with remainder to his daughter *Mary* in fee, whose eldest son the present claimant was: and which affidavit also stated, that application had been made to the lord and his steward for leave to make the required inspection, which they had refused.

Park shewed cause on behalf of the lord, whose father had purchased the premises, of which he had been in possession for some years, and objected to the right of the claimant to inspect the rolls, there being no cause depending in which the title was involved: for which he cited *The King v. Allgood*, 7 Term Rep. 746, where a similar application was denied on that ground.

Lord ELLENBOROUGH, C. J. I do not know why there should be any cause depending in order to found an application of this sort. This is not the impertinent intrusion of a stranger; but the application of one who is clearly entitled to the copyhold, unless there be some conveyance of it by those under whom he claims: he may therefore well require to see whether there appears upon the rolls to be any such conveyance.

The Court thereupon made the rule absolute, so far as related to the copyhold lands claimed.

Blewitt v. Marsden.

10 East, 287. July 6, 1808.

Where a sham plea was pleaded of judgments recovered in the court of *Piepoudre* in *Bartholomew Fair*, in terms palpably fictitious and out of the regular course, the court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings.

TO an action against the acceptor of a bill of exchange the defendant pleaded a sham plea of judgments recovered in the Court of *Piepoudre* in *Bartholomew fair*, which were framed in terms obviously denoting fictitious proceedings; and *Park* for the plaintiff, in consequence, applied for a rule to shew cause why the plaintiff should not be at liberty to sign interlocutory judgment in this case as for want of a plea, (treating it as a nullity; it being palpably, and upon the face of it, a sham plea,) and why the defendant's attorney should not pay the costs occasioned by the plea, and of this motion. And on cause shewn by the *Attorney-general*, he did not attempt to justify what had been done, but endeavored to excuse the pleader and the defendant's attorney, upon the ground of their having been misled by an improper practice which had crept in, of putting such sham pleas upon the files of the Court. He observed, that it might be difficult to prevent altogether the practice of putting in sham pleas of judgments recovered in the usual form; and

he would not discuss the different merits of the respective forms of pleading them.

The Court said, that there might be occasions where they would not enter into any question as to the truth of a plea of judgment recovered, pleaded in the usual form, upon motion, but await the time for producing the roll when such a plea would be regularly disproved; but they expressed great indignation against the abuse which had grown up of late, and was continually increasing, of loading and degrading the rolls of the Court with sham pleas of this nonsensical nature, making them the vehicles of indecorous jesting; by which it sometimes happened, that the time of the Court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in futile investigations of nice points which might arise on demurrer to such sham pleas. And therefore, in order effectually to put a stop to the practice in future, they made the rules absolute in this and several other causes wherein the same form of plea had been filed(1).

MEMORANDA.

Mr. Serjeant *Heywood* was made a *Welch* Judge in *March*, 1807. And in *Hilary* term last, *John Balguy*, Esq. of the Middle Temple, received a similar appointment. And in the course of the long Vacation, after this term, *Nathaniel Goodwin Clarke*, Esq. of *Lincoln's Inn*, was appointed one of his Majesty's counsel learned in the law, and took his seat within the bar in the ensuing term.

(1) Vide *Pierce v. Blake*, 2 Salk. 515. *Solomons v. Lyon*, 1 East, 372. 1 Chitty on Pleading 505. *Arden & al. v. Rice & al.*, 1 Caines, 498.

CASES
IN
MICHAELMAS TERM,

IN THE FORTY-NINTH YEAR OF THE REIGN OF GEORGE. III.

John Lane and Anna Louisa his Wife, and Elizabeth Howorth, Widow v. Walter Wilkins, Henry Allen, Thomas Davies, Morgan Walters, Clerk, and Frances his Wife, Richard Norman, and Mary-Ann his Wife, Jane Howorth Graham, an Infant, (by Guardian,) and William Howorth Davies, an Infant, (by Guardian.)

10 East, 241. . Nov. 7, 1808.

A., having no issue, and being tenant in tail under the will of Dr. *G.*, with remainder to *B.* and *C.*, for life, remainder to the heirs of their bodies for such estates and in such proportions as they; or the survivor, should appoint, and in default of such appointment, remainder to the heirs of the body of *B.*, with remainders over; made his will, whereby after devising certain estates to trustees to sell and apply the purchase-money amongst different relations, and directing them to sell *all* other his real estates, and apply the money to some of those relations; he gave *5l.* a piece to *C.* (who survived *B.* and to *D.* the only child of *B.* and *C.*), "in consideration of the ample provision made for them after my decease by Dr. *G.* who has by his will devised to them certain estates in *R.*, now in my possession, which, though I could now legally dispose of, I mean fully to *confirm* to them, according to the intent of the said will." After this *A.* suffered a recovery, and declared the uses to himself for life, remainder to such persons and for such uses as he by deed, will, or codicil, to be properly attested, should appoint: and for default of such appointment, to *C.* for life, remainder to *D.* for life, with remainder over in fee. After this he made a codicil, duly executed, whereby he *confirmed* his said will in all respects not thereby altered; and after making some alterations in respect of other property, he declared such codicil to be part of his said will.

Held that *C.* and *D.* took nothing under the will and codicil of *A.* in the property which had belonged to Dr. *G.*; for it did not appear that *A.* intended by his will to devise the property in question, but rather to let it pass as it was devised by the will of Dr. *G.*: and his confirmation of his will by his codicil could not carry it further.

But even if he had intended to exercise a devising power by the will, according to the estates carved out by Dr. *G.*'s will for *C.* and *D.*, yet he afterwards altered that intent, and took a new estate in the premises by suffering a recovery: the uses of which were different from those of Dr. *G.*'s will; reserving to himself the power of appointment by deed, will, or codicil: and when he executed a codicil afterwards, confirming his will in all respects, except where altered or revoked by his codicil, and then making specific alterations as to other parts of his property, without reference to his power or to the property in question; (though such reference be not essentially necessary to the execution of a power, if it plainly appear that the party meant to execute it) nothing appeared to shew that he meant to execute the power by his codicil confirming his will generally, supposing it could take effect through the medium of such a will.

THE Lord Chancellor sent this case for the opinion of the Judges of this Court.

On the 26th of *November 1773*, the Rev. Dr. *Griffiths*, being seised in fee of messuages and lands in *Radnorshire*, by his will duly executed and attested, devised the same to trustees for 500 years upon the trusts therein mentioned; and subject thereto he devised the said estates to his cousin *John Howorth* for life: and after his decease to the heirs of the body of *John Howorth*; and for default of such issue, then subject as aforesaid, to *Edward Howorth*, and his wife, the plaintiff *Elizabeth Howorth*, whose maiden name was *Lane*, for their lives and the life of the survivor; and after their deceases, subject as aforesaid, to the use of the heirs of the body of *Ed. Howorth* and his wife, for such estates, and in such parts, shares, and proportions, and subject to such charges and limitations, as *Ed. Howorth* and his wife, by deed or writing, duly executed in the presence of three witnesses, should appoint; and in default thereof, as the survivor of them (*Edw. Howorth* and his wife) by will or any other deed or writing, to be in like manner duly attested, should appoint; and in default of such appointment, to the use of the heirs of the body of *Edw. Howorth*; and for default of such issue, to the right heirs of *Edw. Howorth*. Dr. *Griffiths* died in 1774; on whose death the devisee, *John Howorth*, entered upon the devised premises, and continued seised thereof until his death. The devisee, *Edw. Howorth*, died in the lifetime of *John Howorth*, and without having joined with his wife in making any appointment pursuant to the will of Dr. *Griffiths*; leaving the plaintiff, *Elizabeth*, his widow, and four children by her, viz. *Edward*, *Douglas*, and *Emma*, (all since deceased without issue), and the plaintiff *Anne Louisa Lane*. On the 19th of *November 1800*, after the death of *Edw. Howorth*, and his first three named children, *John Howorth* made his will, duly executed and attested, beginning, "This the last will of me *John Howorth*, of "*Hay*," &c. and he thereby devised to *W. Wilkins* and *H. Allen*, and to the survivor and his heirs, his messuage, farm, and lands, &c. called *Lumpadery*, in the parish of *Lowes* in the county of *Radnor*; and also his dwellinghouse in *Hay*, &c. (describing particular parcels) *habendum* to the trustees in trust, after his decease, to sell and dispose of the premises, and lay out the purchase money, viz. the first 100*l.* of it, in real or government security, and apply the interest half-yearly for the use and benefit of his sister *Frances Davies*, during her life, and in the meantime out of the rents and profits of the devised estates, (which he charged with the same) to pay his sister 20*l.* half-yearly, &c. and he directed the remainder of the rents and profits to be divided and paid by his trustees amongst his nephew, *Tho. Davies*, and his nieces *Frances* the wife of the Rev. *Morgan Walters*, and *Mary Ann* the wife of Captain *Richard Norman*, 1-4th to each, and the other fourth to his nephew *Wm. Davies* and *Mary* his wife, and their children, in such manner as the trustees should think proper. And as to the surplus sale-money above the 100*l.* to be laid out for the benefit of some of the above-named and certain other of his relations, in certain proportions and for such interests, as were therein particularly specified. And then reciting that he had contracted with certain persons for the purchase of three dwelling-houses in the town of *Hay*, with an orchard, &c. and was to complete the same on the 2d of *February* next, on having a good title made thereto; he willed that in case the purchase should be completed during his life, the premises so contracted for should be sold by his trustees; and he thereby directed them to sell and dispose of the same and all other his real estates, in such manner and at such time as he had therein before directed for the sale of his estates mentioned in the former part of his will, and to pay and apply the money arising from the sale thereof to and amongst his said several nephews and nieces, (children of his sister *Frances Davies*), in such proportions and in such manner to all intents and purposes as he had therein before directed in respect of the money to arise from the sale of the premises first therein devised. And as to his personal estate, after payment of his debts and funeral expences, he bequeathed as follows, viz. "I give to the widow of my

late brother *Edw. Howorth*, and to her daughter *Mrs. Louisa Lane* 6*l.* each :
 “and I give them these small sums only, in consideration of the ample provision made for them after my decease by the late Dr. Thomas Griffiths, who has by his will devised to them certain estates in the county of Radnor, now in my possession, and which, though I could now legally dispose of, I mean fully to confirm to them according to the intent of the said will.” He then gave to his niece, *Frances Walters*, all his silver plate and plated goods, and to his god-son *F. Allen*, son of the said *Henry Allen*, 5*l.*; and the rest and residue thereof he gave and bequeathed to the said *W. Wilkins* and *H. Allen*, and the survivor of them, his executors, &c. in trust to be applied by them in like manner as he had before directed as to the produce of his real estates when sold, and to go in aid thereof; appointing the said *W. Wilkins* and *H. Allen* his executors. And the will ended thus: “In witness whereof I have to this my last will and testament set my hand and seal the 19th day of November 1800. *John Howorth*, (L. S.)” (with the signature and attestation of the subscribing witnesses.)

By indentures of lease and release of the 20th and 21st of March 1801, between *John Howorth* of the first part, *Henry Allen* of the second, and *Walter Wilkins* of the third part; *John Howorth* conveyed and released the premises so devised by the will of Dr. Griffiths to the defendant *H. Allen* and his heirs, to enable him to become tenant to the præcipe, in order that a common recovery might be suffered thereof, which should enure to the use of himself (*John Howorth*) for life, with remainder to the use of such persons and for such uses, intents, and purposes, as he, by any deed, or by his last will in writing, or by any codicil thereto, to be properly attested, should limit, appoint, give, grant, or dispose of the same; and for want of such limitation, appointment, &c. or disposition, to the use of *Elizabeth Howorth* for life, subject to impeachment of waste, with remainder to the use of the plaintiffs, *John Lane* and *Anna Louisa* his wife, for their lives and the life of the survivor, with remainder to the use of *W. Davies*, *Thomas Davies*, *Frances Walters*, the wife of the Rev. *Morgan Walters*, and *Mary Ann Norman*, the wife of *Richard Norman*, all therein named, as tenants in common in fee. In pursuance of these deeds a common recovery of the premises was duly suffered in the Court of Great Sessions of the county of Radnor at the then Spring Sessions; by the record whereof it appears that the Great Sessions commenced on Monday, the 23 of March 1801, and that the writ of seisin was sued out returnable on Friday the 27th of the same month, and that the sheriff returned the writ accordingly; having by virtue of the same writ caused seisin to be delivered to *Walter Wilkins* on Thursday the 26 of the same month.

John Howorth, on the 25 of the same month of March 1801 made and published the following codicil to his will, duly executed and attested; “A codicil to be added to, deemed and taken, as and for part of the last will of me *John Howorth*, of Hay, &c. dated in November last past. In the first place, I confirm my said last will in all respects, except where the same shall be altered or revoked by this codicil. Item, I give to *Wm. Prosser*, son of *Wm.* and *Eliz. Prosser*, of Hay, &c. all that messuage, &c. wherein *Wm. Prosser*, the elder, doth now dwell, &c. to hold to the said *Wm. Prosser*, the younger, his heirs, &c. Item, I give unto *Frances*, wife of *Morgan Walters*, of Hay, &c. her heirs and assigns, all my household furniture, plate, &c. for her sole use, &c. In witness whereof I the said *John Howorth* have to this codicil, which I declare part of my said will, set my hand and seal, this 25 of March 1801.” The testator, *John Howorth*, at the time of making the codicil, had no real estates except the estates mentioned in his will. When *John Howorth* suffered the recovery, and made his said codicil, the plaintiffs, *John Lane* and his wife, had been married several years without having had issue. *John Howorth* died on the 29th of March 1801; and thereupon the plaintiff *Eliz. Howorth*, entered on the premises, and soon afterwards executed a deed

of appointment, conformable to the will of Dr. *Griffiths*, and thereby limited the premises, after her own decease, to the plaintiff *Anne Louisa Lane*, and the heirs of her body; and the plaintiffs, having suffered a recovery of the premises, exhibited their bill in Chancery against the defendants, praying among other things, to have the title deeds of the premises delivered up to them. And, on the 8th of *May* 1807, the Lord Chancellor ordered this case to be stated, and the following question to be put for the opinion of the Court, viz. Whether the plaintiffs took any and what estate in the premises under the will and codicil of *John Howorth*?

The case was first argued in last *Michaelmas* term, and again in last *Trinity* term: the Court having directed it to stand over, upon an intimation that certain parts of the will which were not stated in the case as directed by the Lord Chancellor to be sent for the opinion of this Court, had been afterwards added by consent of parties; until it was ascertained that his Lordship, upon such new statement of facts, entertained any doubt on which he was desirous of having the advice of this Court. And Lord *Ellenborough*, C. J. said, that the Court did not sit to answer cases which the parties themselves chose to bring before them in this form for their opinion. And that very recently the Court of Common Pleas had refused to hear a case argued before them which had been sent there by agreement between the parties concerned, without the desire of the Lord Chancellor.

Abbott, for the plaintiffs, contended that the plaintiffs took under the will and codicil of *John Howorth* such estates as they would have taken under the will of Dr. *Tho. Griffiths*, if *J. Howorth* had not suffered a recovery; viz. that the plaintiff *Elizabeth Howorth* took an estate for life, with a power of appointing to the plaintiff *Anna Louisa Lane*, or in default of appointment, that *A. L. Lane* took in tail. Then, after observing upon the dates of the several facts and proceedings relating to or affected by the recovery; as that the will of *J. Howorth* was of the 19th of *November* 1800; the deeds to lead the uses of the recovery, of the 20th and 21st of *March* 1801; the codicil, of the 25th of the same month; that the Great Sessions, in which the recovery was suffered, commenced on the 23d of the same *March*, that the writ of seisin was returnable on the 27th, and the sheriff's return that he had caused seisin to be delivered on the 26th; (which day was not material^(a)); on which facts the recovery must be taken to be as of the first day of the Great Sessions, according to *Shelley's* case, 1 Rep. 93, and therefore prior to the codicil: though he observed that the case should have stated the first process, which was the writ of *quod ei deforciat*, before the codicil: he argued the case, First, as if the recovery had been suffered by *John Howorth*, without any declaration of its uses; so as to have given him the fee. Then the case would have stood thus—The testator, *John Howorth*, having obtained, through the bounty of Dr. *Griffiths*, such an estate as enabled him to obtain complete dominion over it by suffering a recovery, which, if he had not suffered, the plaintiffs would take the estate; being by such recovery seised in fee, makes his will, whereby, after making provision for several other relations, he gives to the plaintiffs, *Elizabeth* and *Anna Louisa*, only 5*l.* each; observing that he does this because “of the ample provision made for them “after my decease by the late Dr. *Griffiths*, who has by his will devised to “them certain estates in the county of *Radnor*, now in my possession, and “which, though I could now legally dispose of, I mean fully to confirm to “them, according to the intent of the said will.” The effect of that would be a devise to them of the same estates as were devised by Dr. *Griffiths'* will, by reference to, and through the medium of, that will. It would then be like the case of *Milford v. Smith*, which is thus reported in 1 Salk. 225.

(a) *Goodright v. Rigby*, 2 H. Blac. 46, and 5 Term Rep. 177, and vide *Selwyn v. Selwyn*, 2 Barr. 1181. The writ of seisin is never in fact executed.

A., being seised in fee, in consideration of marriage, covenanted to levy a fine to certain uses; but no fine was levied. Then A., reciting this deed, by his will "*devises and confirms* all estates given and granted to his son in marriage, "according to the deed." And the Court, on a special verdict, held that the will had reference to the deed, and passed such lands and estates as were intended to be conveyed by the deed and fine. If the word *devise* had been in the will, it could hardly have borne an argument; but by the report of the same case in 4 Mod. 131., which professes to give the words of the will, they were "Item, I do *ratify and make good*," &c.; in 1 Show. 359, they are "*ratify and confirm*;" and in Comb. 195, the words are, "I do hereby *make good and confirm* the estates granted in marriage for 'the use of my son.'" &c. Here, then, taking the recovery as suffered prior to the codicil, and to the will as speaking from the date of the codicil, the word *confirm*, with reference to Dr. Griffiths' will, is equivalent to the word *devise*, and shews the intent of John Howorth, the testator, to be, that the plaintiffs should have by his will the same estates and interests as they would have had under the will of Dr. Griffiths, supposing no recovery had been suffered: the codicil operating as a republication of the will in respect of every thing not thereby altered. Then, 2dly, The declaration of the particular uses of the recovery will not differ the case from what it would have been if the use had been declared merely to John Howorth himself in fee. In fact he was then seised for life only, with a power of appointment by deed, will, or codicil; and in default of such appointment, remainder to Elizabeth Howorth for life; remainder to John Lane and Anna Louisa his wife for their lives and the life of the survivor; with remainders over. And he had by his will devised to these persons the same estates and interests as they would have taken under Dr. Griffiths' will. The import then of John Howorth's will is this: "Dr. Griffiths meant to give you certain lands and for certain interests specified in his will. I have the power of preventing this; and I have already done an act by which, if I do not make a change, you will derive a less interest than Dr. Griffiths meant to give you: but I chuse you should have exactly what he meant to give you: and for that reason I give you only nominal legacies. Take, therefore, such estates and interests as are expressed in Dr. Griffiths' will." This would operate as a good execution of his power of appointment: and for this purpose a precise and formal reference to the power is not necessary; as was said by Lord Thurlow in *Andrew v. Emmot*, 2 Bro. Chan. Rep. 303, and may be collected from other cases (a). 3dly, Considering the case, as it really is, that is, the will as having been made prior to the recovery, and the codicil afterwards, the codicil is a republication of the will, and makes the latter speak after the recovery. This is now fully settled, by *Acherley v. Vernon*, Com. Rep. 381, *Doe v. Davy*, Cowp. 158, *Barnes v. Crowe*, 4 Bro. Chan. Cas. 2, and 1 Ves. jr. 486, and *Pigott v. Waller*, Ves. jun. 98. It will be objected, however, that by giving this effect to the codicil, it will be attributing to the words of the will a different meaning from that which they had when the will was made: but if the legal effect of the codicil be to make the will speak from the date of the codicil, the meaning of the words must be taken at that date. The intention of the testator must in the first place be sought for in the words he has used; though it may be admitted that if it elsewhere appear that the ordinary sense of the words does not express the intention, another sense may be given to them. But that must be shewn clearly, otherwise the ordinary sense of the words must prevail. It is clear however, that the ordinary sense of them is not contrary to the true intention of the testator, who certainly meant these plaintiffs to take the same estates they would have had under Dr. Griffiths' will; though he

(a) Vide *Standen v. Standen*, 2 Ves. jun. 589, and *Hales v. Margetrum*, 3 Ves. jun. 300.

inaccurately states in his will that he had then a legal power of disposing of the property in question; which he had not in him then; though he might acquire that power at any time by suffering a recovery, as he afterwards did. Then the codicil made after the recovery, and *confirming* the will, must be taken to have intentionally adopted the language of the will as applied to the then existing state of things, when he had acquired that power. [*Le Blanc, J.* May it not be argued that the testator *John Howorth* did not mean to dispose of this property at all by his will, but meant to leave it to pass as it would do under the will of *Dr. Griffiths*, supposing that he did not bar the entail, which at that time he had not done? There is the difficulty. Suppose he had said in terms, "Though I have the power by suffering a recovery to dispose of this property; yet I do not mean to dispose of it, but shall let it pass to those in remainder under *Dr. Griffiths' will*." Lord *Ellenborough, C. J.* Suppose he had only said as to this estate, "I shall leave it to go to the persons to whom *Dr. Griffiths* has devised it." The words used in the will are stronger, when he says that he means fully to *confirm* it to them, according to the intent of the said will; for that is an adoption of the same intent; and a *confirmation* of an estate by one who has power to convey operates as a grant of it. Then when he afterwards *confirmed* his will by the codicil, he had the power which he before supposed himself to have.

Owen, contra, assuming for the purpose of the argument, that the recovery was complete before the date of the codicil, first argued the question how far the codicil was a republication of the will, as to the property in dispute, in which the testator had acquired a new estate subsequent to the will. Down to the case of *Acherly v. Vernon*, Com. Rep. 381, the decisions had been uniform, as was said by the Master of the Rolls in *Pigott v. Waller*, 7 Ves. jun. 118, that after-purchased lands could not pass without an actual republication of the will; but even in *Acherly v. Vernon* the House of Lords, did not determine, that every codicil duly executed would republish a will: but, as the Master of the Rolls considered, it is a question of *intention* upon the particular wording of the codicil in each case. The ground the Judges took in *Acherly v. Vernon*, as appears from what Lord *Hardwicke* said in *Gibson v. Rogers*, Amb. 97, was, that the words of the codicil referring to the words of the will, they were so incorporated together that they necessarily made but one instrument. In *Barnes v. Crowe*, 4 Bro. Ch. Cas. 2. and 1 Ves. jun. 486, the Lords Commissioners decided on the same ground. It is so stated by the Master of the Rolls in *Pigott v. Waller*, 7 Ves. jun. 120: for the first codicil was begun upon the last sheet of the will, and continued to another sheet; and the second codicil duly attested was begun upon the last sheet of the first. And there was this further circumstance, that the will assumed to pass all the estates the testator might die seised or possessed of: as it did also in *Acherly v. Vernon*. And finally his honour determined *Pigott v. Waller* (which he admitted was not materially different from the present as to the question of republication of the will) on the ground of an apparent intention in the testator by his codicil, directed to be annexed to his will and made part thereof, and referring to and altering it in part, to republish his will. But in *Lady Strathmore v. Bowes*, 7 Term Rep. 487, (which has never been overruled,) though Lord *Kenyon* admitted that a codicil, confirming a will of lands in general words, will pass land purchased in the interval; yet he states the question to be, whether it were the intention of the deviser to pass by that codicil anything more than would have passed by the will itself; and in that case the after-purchased lands were held not to pass, by reason of the word *said* (said lands) in the codicil, which confined it to the same lands before given by the will. Then 2dly, taking the codicil to have been a republication of the will, the question is, whether upon the face of the two instruments there appears to have been any intention in the testator to dispose of this estate which he had

at the time of making the will, or to execute the power of appointment which he had at the time of making the codicil. It is admitted, that *John Howorth* when he made his will had no power to dispose of the estate. He appears to have accurately known what property he had; and he makes a distinct disposition of different parts of it. And after directing the sale of certain of his estates by his trustees, and making a disposition of different sums to different relations, he directs his trustees to sell certain newly purchased houses "and *all other his real estates*" in such manner as he had before directed for the benefit of his nephews and nieces. Then he goes on to state, that with respect to the estates in the county of *Radnor*, then in his possession under the will of *Dr. Griffiths*, "though I could now legally dispose of them, I mean fully to confirm to them (the devisees in remainder under *Dr. Griffiths'* will) according to the intent of the said will." Then what is this in effect but saying, "I know that I am tenant in tail of these estates, and that I might make them my own by suffering a recovery; and that if I do not suffer a recovery, you, the devisees in remainder under *Dr. Griffiths'* will, will take after me the estates which he has given you. And I hereby shew you, that by not making them my own and disposing of them, you the devisees will not succeed to them by any mistake or inadvertence of mine; but because I purposely forbear to suffer a recovery of them and to make any disposition of them: meaning that you shall succeed to them by my permission according to the intent of his will." This is no *devise* of the property; but a notification that he did not mean then to exercise the power of disposition which he knew he might acquire by suffering a recovery. But the testator afterwards altered his intention, and did suffer a recovery; and by the deed to lead the uses he actually gives to the plaintiff *Elizabeth Howorth* and *A. L. Lane* mere life estates, being less interests than they would have taken under *Dr. Griffiths'* will; with remainder over in fee to the nephews and nieces. But still looking to the possibility of his again altering his mind, or having issue of his own, the testator reserves to himself, after the limitation of his own life estate, a power of appointment by deed, will, or codicil properly attested. Then taking the codicil to be after the recovery suffered, and to be a republication of the will, what more can it do than to bring the words of the will down to its own date, and to declare the intention of the testator as it is to be collected from those words at that period, the same as if it had restated the will. The codicil does not affect to express any new intention of the testator respecting this property: it is a simple confirmation of his will in this respect, and consequently a confirmation of his intention at the time of making his will. And there is no case where a codicil republishing a will has been held to give a different sense to the words than what they would have borne at the time of making the will. In *Milford v. Smith*, 1 Salk. 126, the will which referred to the deed was only held to pass such lands and for such estates as were intended to be conveyed by the deed and fine: and if the testator's intention appeared to devise those estates, it was matter of indifference whether he named them expressly in the will, or by reference to the deed in which they were included. But here it appears by the will that the testator did not mean to devise these estates, which he had not the power of devising at that time, but to leave them to pass by *Dr. Griffiths'* will; and that intention was defeated by the recovery, which gave him a new estate. But if the effect of the republication of the will be to pass any after-acquired property which is within the words of it, though not within the testator's intention at the time of the will; the only words capable of passing this property are those whereby he directs his trustees to sell and dispose of "*all other his real estates*," &c. in the manner before directed, and to pay and apply the money arising from the sale amongst the defendants, his nephews and nieces there named. For at the time of executing the codicil these were *his real estates*, though the words were used in the will in a different

sense. 3dly, As to the codicil and will being an execution of the power reserved to *John Hqworth* by the deed; although it be not necessary that the instrument executing a power should refer expressly to the power; as in *Standen v. Standen*, Ves. jun. 589, where one devised *all* her estates, and had none other to give but under the power; yet here the same objection applies as before stated; it must appear that the person having the power meant to pass the estate by his own act, and not to leave it to pass by the act of another. The rule was laid down by Lord *Thurlow* in *Andrews v. Emmott*, 2 Bro. Ch. Cas. 303, that "if a man dispose of that over which he has a power, in such a manner, that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. But the doctrine is not carried by any case further than this." Besides, here the words of the power look to a will or codicil *to be executed*: it is to appoint to the use of any person as he by deed or will, &c., *to be properly attested, should limit or appoint*. This could not be intended of a will then actually made, and the disposition of which, if any, was completely at variance with the deed reserving the power. Then supposing the codicil to bring down to its date the words of the will, it could not give a new sense to them, nor to the words of the deed. But it is impossible to impute to the testator an intention to execute this power by his codicil, the utmost operation of which can be to republish the words of the will. For when he made his will, it is clear that he did not mean to alter the disposition of the property made by Dr. *Griffiths'* will: but he afterwards altered his mind, and suffered a recovery, reserving to himself a life estate with a general power of appointment. Then it must be supposed that he meant by the codicil to set up the will of Dr. *Griffiths* in order to give an estate tail to Mrs. *Lane*, by which he would have defeated his own issue, in case he had any; and by which he would destroy the operation of the recovery and the deed to lead the uses, which he had but just before executed. 4thly, If the will be set up by the codicil, as devising the property according to the limitations of Dr. *Griffiths'* will, the limitation to the plaintiffs will be after an indefinite failure of issue of the testator himself, and therefore void: for he cannot be taken to have devised first to himself in tail.

Abbott, in reply, said, that the reference to Dr. *Griffiths'* will must be taken to be partial and not general, as giving only to the plaintiffs the estates which they would have taken under that will. [Lord *Ellenborough*, C. J. What words would you insert in carving out the estates that these several persons would take, to make an effectual republication of the will: you could not make the testator devise to himself?] If the testator had left a son, he would have taken an estate tail, with remainder in tail to the plaintiff *Eliza's* *reth*, &c. [Barley, J. Supposing an elder son of the testator had died in the testator's life-time, leaving a son; then that son would not have taken, if you suppose the testator to have devised to his eldest son in tail, remainder to his second and other sons in tail.] In that event it would be necessary, to effectuate the intent, to introduce a remainder in tail to the son of such eldest son. [Le Blanc, J. The objection to this construction is that it introduces so many distinct limitations which are not to be found in Dr. *Griffiths'* will, to which the testator referred.] If the testator be taken as referring to the whole of Dr. *Griffiths'* will, then such a construction must be put upon it as would be consistent with the whole of his intention, which was that all the issue of the testator himself and their issue should take estates tail in succession before the estate went over: but it may also be taken to refer to such parts only of Dr. *Griffiths'* will as gave estates to the plaintiffs. And in the event none of the difficulties suggested would arise. Then this construction will not make the codicil give a different meaning to the words of the will than the testator intended at the time; for he conceived that he had a power of disposing of the property when he made his will, and therefore, however mistaken in that fact, his intention was the same

at both times. [Lord *Ellenborough*, C. J. May he not have meant by the words he used,—“I could have defeated Dr. *Griffiths*’ will; but I will not, you shall take under it as he meant you to take: without executing any devising power at all?] But then he *confirms* the will, which assumes a devising power. Then it is clear that he did not mean by the will to give this estate to the defendants, by the devise of all other his real estates to the trustees, &c.; because he gives the plaintiffs only 5*l.* each, in consequence of the ample provision made for them by Dr. *Griffiths*’ will.

LORD ELLENBOROUGH, C. J. The question will turn very much upon the intention of testator; we will certify our opinion.

The following certificate was afterwards sent:

This case has been argued before us by counsel: we have considered it, and are of opinion that the plaintiffs did not take any estate in the premises under the said will and codicil of the said *John Howorth*.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
JOHN BAYLEY.

Soane v. Ireland and Others.

10 East, 259. Nov. 8, 1808.

An allegation in a declaration that one was seised of a *manor* of *F.*, and that he and all those whose estate he has in the *said manor* have immemorially appointed a sexton of the parish of *F.* is sustained by proof of his seisin of a *quondam* manor, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation.

IN an action for a false return to a *mandamus* for appointing a sexton, the second count stated that *T. S. Champneys* was seised in fee of the manor of *Froome Selwood*, with the appurtenances, and that he and all those whose estate he has, and at the several times hereinafter mentioned, had in the *said* manor, with the appurtenances, for the time being, from time immemorial have had exercised and enjoyed, and been used and ought of right to have, &c. the privilege and right of appointing a sexton in the parish of *Froome Selwood* when the office was and should be vacant. It then stated the vacancy of the office, at a certain time, and that *T. S. Champneys* duly appointed the plaintiff to it; and that the defendant *Ireland* being then the vicar, and the other defendants the churchwardens of the parish, had notice of such appointment, and ought to have admitted the plaintiff to the office, but had refused to do so; in consequence of which the *mandamus* issued to them; to which they had returned that the plaintiff was not duly appointed to it in manner and form as stated; and for this false return the action was brought. The evidence at the trial at *Wells* was, that *Froome Selwood*, which was once a legal manor, had ceased to be for some period before the vacancy in question, for want of any freehold tenants: though in all other respects *Mr. Champney’s* right was proved as laid. But for this objection it was urged that the plaintiff ought to be nonsuited; his right to the appointment being laid as appurtenant to his alleged seisin of a manor, which had no longer any legal existence: but *Bayley, J.* over-ruled the objection, and the plaintiff recovered. And now

Pell, Serjt. moved for a new trial, upon the defect of evidence to sustain the allegation of *Mr. Champney’s* seisin of the manor in right of which the prescriptive privilege was claimed. But by

LORD ELLENBOROUGH, C. J. If *Froome Selwood* were once a manor, as it appeared, this prescriptive right would still belong to it, though other manerial rights, such as that of holding courts for want of freehold tenants, might be gone and severed from it. It would still be a manor by reputation for this

purpose, which will satisfy the allegation; and it was not necessary to prove it a continuing manor for all purposes.

Per Curiam,

Rule refused(a).

Denn, on the Demise of Brune, Clerk v. Rawlins.

10 East, 261. Nov. 9, 1808.

Tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessor in possession under a void lease granted by tenant for life under a power, the rack-rent value of which was 30*l.* a year, cannot maintain an ejectment, laying his demise, at least, on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser, after such recognition of a lawful possession either in the relation of tenant, or at least as continuing by sufferance till notice.

THIS was another ejectment brought to recover other lands upon the same title as was stated in the former case reported, of *Roe d. Brune v. Pri-deaux*, Ante, 168. The defendant claimed under a defective lease made by the last tenant for life under the power there stated; which lease reserved the ancient yearly rent of 1*l.* 18*s.* 6*d.*, and a heriot, or 1*l.* 5*s.* in lieu of it; and this rent had been received by the lessor of the plaintiff, the first tenant in tail under the settlement, from 1796, when the last tenant for life died, up to *Michaelmas* 1805; the rack-rent value of the premises being 30*l.* a-year. This ejectment was brought in 1806, and the demise laid after the last receipt of rent, but before the ejectment brought: but no notice to quit of any kind had been given. Wherefore it was objected at the trial, that the receipt of this ancient reserved rent by the tenant in tail was a recognition of the defendant's holding under a tenancy of some sort; if not as tenant from year to year, at least as tenant at will; and that the tenancy could not be determined, so as to make the defendant a trespasser at the time of the ejectment brought, without notice. And the defendant's counsel put his case to the jury on that ground. And *Bayley, J.* before whom the cause was tried at the last assizes at *Bodmin*, left the question to the jury, whether by this receipt of the old rent the lessor did not agree that the defendant should continue in possession until he received some notice to quit, so as to legalize his possession in the mean time, and prevent his being treated as a trespasser at the time of the ejectment brought: the learned Judge observing, that the demise was laid on the 1st of *January* 1806, which was before the delivery of the declaration; in answer to an argument urged by the counsel for the lessor of the plaintiff, that taking the defendant to be a tenant at will, (which he had denied; contending that there was no tenancy at all subsisting between these parties;) the bringing of the ejectment was a determination of that will(1). And the jury having found for the defendant,

Lens, Serjt. now moved for a new trial on the ground that there was no evidence to be left to the jury of any tenancy at all subsisting, which it required any notice to determine before the bringing of the ejectment; the receipt of the old conventional rent of 1*l.* 18*s.* 6*d.* being clearly referable to the void lease under the power, which had been determined not to be binding on the tenant in tail; and the great disparity between that and the fair rack rent of 30*l.* furnishing no ground for presuming a contract of any kind between the parties for the defendant to hold as tenant on the terms of the void lease. And he referred to the case of *Right v. Bowden*, 3 East, 260, as in point; the only difference being, that that was a case of copyhold, but the principle

(a) Vide *Sir Moyle Finch's case*, 6 Rep. 64, and *Rex v. The Bishop of Chester*, per *Holt, C. J.* Skin. 661, 2.

(1) Vide *Doe d. Foley & al. v. Wilson*, 11 East, 56. *Right d. Lewis & al. v. Beard*, 18 East, 210.

was the same. He further urged the difficulty, that if the receipt of the old rent were to be considered as any evidence of a contract that the defendant should hold as a tenant at all, as the doctrine of modern times had been, that what was formerly a tenancy at will was now to be considered as a tenancy from year to year, it might be contended that he was entitled to the regular notice to quit: but the Court having decided against that in the late case, it seemed to follow that no notice was necessary; because the relation of landlord and tenant did not in fact subsist, and could not be implied from this evidence from the manifest improbability of any contract upon such terms.

LE BLANC, J. asked from what time before the ejectment brought it could be said that the defendant became a trespasser? And *Bayley, J.* having stated as before mentioned the manner in which the question had been left to the jury; the Court, after some hesitation, granted a rule to shew cause, &c. But, on a subsequent day in the term, *Dampier*, who was also of counsel for the plaintiff, informed the Court that Mr. Serjt. *Lens* and himself had considered more fully of the question, and were satisfied that they could not support the rule, and therefore moved that it might be discharged; which was ordered accordingly.(2)

(2) It is a general rule, that where the demise is for an indeterminate period, whether it be a tenancy at will, or from year to year, reasonable notice to quit must be given to the tenant in order to maintain ejectment. The cases upon this subject may be classed as follows.

1. As to the term of notice, which is generally, half a year. *Year-Book*, 13 H. 8. 15. b. *Parker d. Walker v. Constable*, 3 Wils. 25. *Roe d. Brown v. Wilkinson* in note (1) by *Butler* to Co. Litt. 270. b. *Right d. Flower v. Darby & al.* 1 Term Rep. 159. *Shirley v. Newman*, 1 Esp. 266. But the term of notice may be different by agreement, or the custom of particular places. *Doe d. Dagget v. Snowdon*, 2 Bla. Rep. 1224. *Roe d. Brown v. Wilkinson*, ubi. sup. *Roe d. Henderson v. Churnock*, Peake's Ca. 4. The term of notice may be varied to correspond with the tenancy; so that on a taking by the month, a month's notice to quit may be sufficient. *Doe d. Parry v. Hazell*, 1 Esp. 94.

2. As to the expiration of the notice to quit, which must be at the end of the year. *Right d. Flower v. Darby & al.* 1 Term Rep. 156. *Doe d. Rigge v. Bell*, 5 Term Rep. 471. *Doe d. Phillips v. Butler*, 2 Esp. 589. *Doe d. Castleton & al. v. Samuel*, 5 Esp. 173. *Doe d. Pitcher v. Donovan*, 2 Campb. 78. S. C. in C. P. 1 Taun. 555. *Thompson v. Maberly*, 2 Campb. 573.

3. As to the form of the notice. *Doe d. Matthews v. Jackson*, Doug. 167. *Doe d. Mathewson v. Wrightman*, 4 Esp. 6. *Doe d. Hinde v. Vince*, 2 Campb. 256.

4. As to the service of the notice. *Jones d. Griffiths v. Marsh*, 4 Term Rep. 464. *Doe d. Lord Macartney v. Cricks*, 5 Esp. 196. *Roe d. Dean and Chapter of Rochester v. Pierce*, 2 Campb. 96. *Doe d. Bradford v. Walkins*, 7 East, 551. *Doe d. Buross v. Lucas & al.* 5 Esp. 153.

5. As to what shall dispense with notice. *Shirley v. Newman*, 1 Esp. 266. *Jackson d. Locksell v. Wheeler*, 6 Johns. 272.

6. As to what shall be a waiver of the notice given. *Doe d. Cheney v. Batten*. Cowp. 243. *Zouch d. Ward v. Willingale*, 1 H. Bla. 311. *Goodwright d. Charter v. Cordwint*, 6 Term Rep. 219. *Roe d. Crompton v. Minshal*, Bull. N. P. 96. *Frielt d. Harris v. Jeffreys*, 1 Esp. 393. *Doe d. Ash v. Calvert*, 2 Campb. 387. *Boggs admr. of Calbraith v. Black*, in error, 1 Binns. 333. *Whiteacre d. Boul't v. Symonds*, ante 13.

7. Where notice is unnecessary. *Throgmorton v. Whelpdale*, Bull. N. P. 96. *Goodright d. Morgan v. Shirley*, Esp. Dig. 462. [or vol. 2. p. 41. Gould's edit.] *Jackson d. Van Denberg & al. v. Brudt*, 2 Caines' 174. *Jackson d. Simmons v. Chase*, 2 Johns. 84. *Jackson d. Dill v. Tyler*, 2 Johns. 444. *Jackson d. Van Allen v. Rogers*, 1 Johns. Ca. 33. S. C. 2 Caines' Ca. in Err. 314. *Jackson d. Fitzroy v. Sample*, 1 Johns. Ca. 231. *Jackson d. Viely & al. v. Cuedon*, 2 Johns. Ca. 353. *Thunder d. Wearer v. Belcher*, 3 East, 449. *Jackson d. Ferris v. Fuller*, 4 Johns. 215. *Jackson d. Cortlandt*, 5 Johns. 123. *Phillips v. Coverle*, 7 Johns. 1. In the following cases it was contended, that notice was unnecessary, but the Court determined otherwise. *Doe d. Williams v. Pasquali*, Peake's Ca. 196. *Doe d. Miller v. Noden*, 2 Esp. 530. *Jackson d. Livingston v. Bryan*, 1 Johns. 322. *Denn d. Markey v. Mackey*, Penn. 420. *Jackson d. Benton v. Laughhead*, 2 Johns. 75. *Jackson d. Carr v. Green*, 4 Johns. 186.

Lord Viscount Galloway v. Mathew and Smithson.

10 East, 264. Nov. 9, 1808.

The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice.

THE plaintiff declared on a promissory note made by the defendants and one *Whitehouse* deceased, on the 16th of *December* 1805, payable sixty days after date, to the plaintiff, or order, for 200*l.* value received; and also on the common money counts. It appeared at the trial before Lord *Ellenborough* at *Westminster*, that the defendants and *Whitehouse* were partners in a brewery; and on the 16th of *December* 1805, *Mathew* wrote to the plaintiff, alleging the misconduct of his partner *Smithson*, in consequence of which the creditors of the partnership had insisted on the payment of their demands; that there was a certain sum to pay to the excise in a few days, and no resource but to apply to friends, and therefore requesting of the plaintiff to lend him his acceptance for 200*l.* at two months, for which he would send him the promissory note of the firm payable four days before the plaintiff's acceptance became due. In consequence of this, the plaintiff agreed to lend him his acceptance, and *Mathew* drew the note in question, which was signed by him for himself and his partners. *Mathew* immediately procured the plaintiff's acceptance to be discounted, and applied 180*l.* of the money to the payment of the partnership debts, reserving the rest for himself. But the note in question not being paid when demanded of the defendants, the plaintiff, after renewing his acceptance to the holder, was ultimately obliged to pay it after *Whitehouse's* death. And now *Mathew* having let judgment go by default, *Smithson* defended the action, on the ground that the plaintiff, before he took the notice in question, had notice of an advertisement then recently published in a newspaper by *Smithson*, wherein he warned all persons not to give credit to the defendant *Mathew* on his (*Smithson's*) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. This fact being proved, Lord *Ellenborough*, C. J. held, that the plaintiff could not recover upon the count for money paid to the use of the three partners; the payment not having been in fact made till after the death of *Whitehouse*: nor upon the count on the promissory note, which the plaintiff had been previously warned by the defendant *Smithson* that *Mathew* had no authority from him to draw on their joint account: and therefore directed a nonsuit, which

Topping now moved to set aside on the last-mentioned ground; contending that one partner had authority by law to pledge the credit of his copartners with his own, on the partnership account; and that the plaintiff had advanced the money on their joint account, to which it had afterwards been for the most part applied. And that the declaration of the defendant *Smithson*, that he would not be liable for the contracts of his partners on their joint account, could not get rid of his legal responsibility. And that at all events, as the plaintiff's acceptance was discounted, and 180*l.* of it immediately applied to the partnership account, the partners were answerable for that.

LE BLANC, J. Can an *assumpsit* be raised by one man's discharging the debt of another, who desires him not to do it upon his credit?

LORD ELLENBOROUGH, C. J. The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority: and

that implication was rebutted in this instance by the notice given by *Smithson*, who is now sought to be charged, which reached the plaintiff, warning him that *Mathew* had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others: they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others.(1).

Per Curiam,

Rule Refused.

Denn, on the Demise of Joddrell v. Johnson.

10 East, 266. Nov. 9, 1808.

Where a copyholder of inheritance, having power by custom to cut timber, surrendered to the use of his will, and devised to *A.* for life, without impeachment of waste, with remainders over; though there was no instance in fact of a copyholder for life in the manor cutting timber; yet the right being annexed to the fee and inheritance, the copyholder in fee in carving out his estate may make a tenant for life punishable of waste; and at any rate, the lord cannot enter upon the copyholder for life's estate, as for a forfeiture, upon his cutting timber; for the injury, if any, is to the remainder-man of the inheritance.

THIS was an ejectment for a copyhold in the county of *Derby*, brought by the lord, on the ground of a supposed forfeiture, by tenant for life, without impeachment of waste, cutting down trees on the copyhold. It appeared at the trial at *Derby*, that this was a copyhold of inheritance, surrendered in 1777 to the use of the will of *Wm. Brooks* the then copyholder, who had devised all his freehold and copyhold lands to the defendant and others, in trust to raise money and pay off incumbrances, and when his nephew *D.* should attain 23, then in trust for him for life, without impeachment of waste; remainder to his first and other sons in tail in strict settlement; remainder to the trustees in fee, one of whom was the defendant, and the trees were cut down by *D.* after he was in possession. But it appearing also, that there was a custom in the manor for the copyholders to cut trees; though no instances were shewn where this had been done by copyholders tenants for life; *Grose, J.* nonsuited the plaintiff.

Vaughan, Serjt. now moved to set aside the nonsuit; contending that no copyholder for life could cut trees, even with a custom, which would only protect copyholders of inheritance: but that here, the only instances proved of the exercise of such a right were by copyholders of inheritance; and therefore the copyholder for life not being within the custom, his cutting timber was a forfeiture of his estate: of which the lord was entitled to take advantage. And he referred to *Mardiner v. Elliot*, 2 Term Rep. 746, as taking the distinction between copyholder for life and copyholder of inheritance in this respect, and negating the power of the former to cut timber in any case for his own use.

(1) No other decided case bearing precisely upon this point has occurred. The notice which has commonly been given, and which has afterwards been the subject of litigation, is a notice of dissolution. As to the general power of one partner to bind the firm in the course of business, and the effect of a notice of dissolution, see *Gorham Pinkney v. Hall*, 1 Salk. 126. 8 C. 1 Ld. Raym. 175. — *v. Layfield & al* 1 Salk. 292, and note (a) by *Evans*, Anon. 12 Mod. 345, 446 Sty. 370. *Storer v. Hinckley*, Kirby 147. *Champion v. Mumford & al* Kirby 170. *Tullier v. Whitehead*, 1 Dal. 269. — *Minni v. Whitney*, 16 Vin. Abr. 244, pl. 12. *Gorham & al. v. Thomson & al. Peake's Ca.* 42. *Graham & al. v. Hope & al. Peake's Ca.* 154. *Godfrey v. Turnbull & al.* 1 Esp. 371. *Abel & al. v. Sutton*, 3 Esp. 108. *Purkin v. Curruthers & al.* 3 Esp. 248. *Lansing v. Gaine & Ten Eyck*, 2 Johns. 300. *Mowatt v. Howland & al.* 3 Day 353. *Kelcham & al. v. Clark & Johns.* 144.

LORD ELLENBOROUGH, C. J. There is a mistake in considering this copyholder as tenant for life, with respect to the lord; for the whole inheritance is out of the lord, and the fee, as to him, is in all the several persons claiming under the surrender to the use of the will of the last copyholder of inheritance: and if the next owner of the fee in remainder do not dispute the act of the tenant for life, it is for this purpose a cutting down by him. The injury, if any, is to the remainder-man: but no injury has been done to the lord, and therefore there can be no forfeiture to him by such an act.

GROSE, J. If the remainder-man had cut down the timber, the lord could not have maintained trover for it.

LE BLANC, J. agreed.

BAYLEY, J. The surrenderor and testator was the owner of the inheritance and he might have cut the timber. Then he might carve out his estate to the several objects of his bounty in what proportions he pleased; and he might give to him whom he made tenant for life the right of cutting the timber.

Rule refused.

Brook qui tam v. Middleton.

10 East, 263. Nov. 10, 1808.

The Court will not grant a new trial in a penal action where the verdict has passed for the defendant on the ground of its being against the evidence.

THE jury having found a verdict for the defendant in an action for usury, *Garrow* moved for a new trial, with respect to one of the counts, as being a verdict against all the evidence: the usury consisting in taking a quarter *per cent.* upon the loan in the name of commission the lender having nothing to do for it but to receive the money at the appointed time of repayment. And the Court appeared inclined to have granted a rule nisi: but they were not satisfied that they had authority by precedent in a penal action, where a verdict had been found for the defendant, without any alleged misdirection of the Judge in point of law, as in *Wilson v. Rastall*, 4 Term Rep. 753, to grant a new trial: and they ordered the matter to stand over to give them an opportunity of looking into the precedents; Lord *Ellenborough*, C. J. saying, that if the Court did not find themselves precluded from entertaining the motion, on the ground of the verdict being against the evidence, they would hear *Garrow* further upon it. And before the Court rose on this day, his Lordship referred to the case of *Fonnereau v. ———* (a), where the Court said, that the rule had been laid down for 50 years past, not to grant new trials in actions on penal laws where the verdict was for the defendant. There indeed the doctrine was laid down rather too generally, as the Court would certainly grant a new trial in case of the misdirection of the Judge in point of law: but in case of a verdict against evidence, the rule was now settled that no new trial would be granted; which was sufficient to dispose of the present motion: and therefore they refused the rule(1).

(a) 3 Wils. 59. The defendant's name was *Bennet*.

(1) Vide *The King v. Maubey*, 6 Term Rep. 688.

Williams and Others v. Powell, Clerk.

10 East, 269. Nov. 10, 1806.

Compositions for tithes cease on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payment due after the death of his predecessor, he can only be accountable to the executors for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to; and not *pro rata*, according to the time which had run before his death from the last payment.

The late vicar of *Abergavenny* made certain compositions with his parishioners for the vicarial tithes, which were payable on the 29th of *September*; and the *Easter* offerings were payable on the 10th of *April* in each year; and having received his compositions up to the 29th of *September* 1802, he died on the 10th of *March* 1803. In the *May* following the defendant, the present vicar, was presented, and in *November* following was inducted. The *Easter* offerings were collected by the sequestrator after *April* 1803, and were paid over by him to the defendant; and after *Michaelmas* in the same year, the defendant received the vicarial tithes from some of the parishioners according to the composition of his predecessor, and from others according to new compositions, some more, some less, than the former; in all to the amount of 181*l.* and upwards. The plaintiffs, who were the personal representatives of the late vicar, brought this action for money had and received against the present vicar to recover a proportion of such compositions up to the time of the late vicar's death, amounting, as they calculated them, to 68*l.* and upwards. The defendant disputed his liability to account for the compositions which were not due till his own time, but paid 20*l.* into court, in order to cover any small sums which might have been due for tithes or dues which, if received in kind, might have accrued between the 29th of *September* 1802, and the death of his predecessor on the 10th of *March* 1803; which sum it clearly appeared was more than sufficient to cover any such tithes or dues. And *Le Blanc*, J. before whom the cause was tried at *Monmouth*, being of opinion that the representatives of the late vicar could have no claim to the *Easter* offerings due after his death, and that his death put an end to the compositions for the vicarial tithes, at least with respect to his successor: and that the present vicar could not be liable to account for more of the compositions which he had received from the parishioners than the value of the tithes due, if any vicarial tithes for milk, eggs, &c. might have accrued in that interval, between the 29th of *September* 1802 and the 10th of *March* 1803, when the late vicar died, would amount to; which were more than covered by the money paid into court; directed the jury to find for the defendant; but gave liberty to the plaintiff's counsel to move to set the verdict aside, and enter a verdict for the plaintiffs for the whole, or so much of the composition as the Court should think them entitled to recover.

Jervis now moved accordingly to enter a verdict for the plaintiff's for 68*l.* and upwards. He admitted, that the compositions ceased in point of law on the death of the former vicar, and that each would, if there had been no compositions, have only been entitled to the tithes accruing due in his own time: but he contended that the present vicar, having adopted the compositions made by his predecessor, and received them as such: and the consideration for such payment being for tithes, part of which at least had accrued in the time of such predecessor, had thereby charged himself with receiving a proportionable part of the gross sum up to the time of his predecessor's death for his use, and had admitted his liability *pro rata* to the plaintiffs by payment of money into court. And he compared this to the case of *Pagett v. Gee*, Amb. 196, where tenant in tail having leased, but not according to the statute, and dying without issue between the days of payment; and the remainder man having

received the whole rent; Lord *Hardwicke* held the latter liable to account for a proportion up to the death of tenant in tail. According to a note of the same case in 1 Burn's Inst. tit. Distress, s. 18, which is cited from a MS., Lord *Hardwicke* is made to say, "I ground my opinion in this case upon the tenant's having submitted to pay the rent: he has held himself bound in consequence to pay it for the use and occupation of the land the last half year: he paid it to the defendant, which he was not bound to do in law: and in such a case the person he pays it to shall be accountable, and considered as receiving it for those who are in equity entitled to it." He admitted that the stat. 11 Geo. 2. c. 19. s. 15, did not apply to this case, the demand not being against the occupiers of the land.

Lord ELLENBOROUGH, C. J. In the case cited each day's occupation by the tenant was valuable to him, and therefore there might be an equitable apportionment of the rent accruing from day to day, in respect of such valuable occupation: and the remainder-man who received the whole might well be considered as equitably accountable for the proportion which accrued in the time of the tenant in tail. But here the composition was at an end by the death of the former vicar; and the present vicar in fact received nothing for him; for no tithes had become due since the last payment in *September* beyond what the money paid into court was sufficient to cover.

Per Curiam,

Rule refused(a).

Sir William Curtis and Others v. Daniel.

10 East, 273. Nov. 10, 1808.

Though the lord of the manor in *Cornwall* may by conveyance and acts of ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet consistently therewith the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than 20 years past establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands within the vill.

IN trover for copper ore raised from mines upon *Towan*, in the parish of *St. Agnes* in *Cornwall*, the plaintiffs claimed on the part of Mr. *Donythorne*, the lord of the manor of *Tywarnehaile Tyas*, within which manor *Towan* lay, though detached from the body of the manor: and it appeared that, besides the manor, the lord had title to the toll of tin; and that he and those under whom he claimed had always in fact received tin dues from mines within *Towan*, as well under the freehold as under the customary lands there, and also under the wastrell or common called *Towan Common*; but no other acts of ownership had been exercised over *Towan* soil by the lord of the manor. The defendant claimed by lease under the respective owners of six ancient tenements in *Towan* vill, five of which were freehold, and the sixth was a customary freehold tenement, held according to the custom of the manor, but not at the will of the lord. And on their part it was proved, that for between 20 and 30

(a) An anonymous case in *Bunbury*, 294, was cited at the trial, with the conclusion of which it appears that the learned Judge's opinion did not altogether coincide. "A rector agrees with a parishioner for his tithes for a certain sum, payable yearly at *Michaelmas*. The rector dies the beginning of *September*. The agreement determining by the death of the parson, the successor shall be entitled to tithes in kind only from the death: and the executor of the last incumbent to a proportion according to the agreement till the time of his testator's death; and this by an equitable construction." *Quære* the the case of *Muly v. Webber*, wherein it was so resolved in *Saccario*."

It seems that if the tithes in kind, for which the composition was made would, supposing there had been no composition, have been wholly due before the death of the rector, his representatives would be legally and equitably entitled to the whole; however they might be restrained by his agreement with the parishioners not to demand payment till the day agreed upon; and the successor could not be entitled to any part of such composition.

years they had made sets of the copper mines, as well under the customary lands and under the wastrell as under the freehold lands; and that these mines had been worked to a considerable extent, and in a manner which was notorious to the whole neighbourhood, to the plaintiff's agents, and to the former proprietors of the plaintiff's estate. That dues to the amount of above 700*l*. for copper ore raised under the freehold and customary lands, and as much more for dues raised under the wastrell, had from time to time been paid to the tenants, and that the value of the ore raised was ten times the amount of the dues. It was also shewn that stone had been twice taken out of a quarry on the wastrell, which was applied to the repairs of buildings on the customary tenement; and in other instances earth had been taken by the tenants of some of the six ancient tenements from the wastrell for building a wall and for making manure; and all the six tenants exclusively stocked *Powan* common. It also appeared that the plaintiffs and the former lords of the manor had an agent, who annually collected their tin dues; and that the former lord used to be in the parish about a month every year. At the trial at the last sittings at *Bodmin*, it was at first insisted, on the part of the plaintiffs, that as the lord of the manor had always received tin dues for the tin mines under *Towan*, he was also entitled to the copper mines, even under the freehold tenements: but this claim was finally abandoned. And it was contended, 2dly, that at any rate he was entitled to the copper under the customary tenement, the freehold of the soil being in him. And, 3dly, *a fortiori*, he was entitled to the copper under the wastrell: and he claimed not merely the dues, but all the copper raised. But *Bayley, J.* held, first, that the presumption of law was that all mines under freehold belonged to the freeholder, though in *Cornwall* it might be otherwise as to tin mines, which were governed by peculiar laws and customs. Secondly, that as to the customary lands, the right to the copper mines might be granted to tenant, and it was to be collected from acts of ownership exercised by him whether it was or not. Thirdly, that though the general presumption of law was that the soil of the waste was in the lord of the manor, yet it might be shewn by evidence of acts of ownership to be in the tenants of the six tenements. That it appeared by admissions entered into between the parties before the trial, that the tenants of these six tenements meant to claim the wastrell as their *property*, so that the lord was apprised of the necessity of proving acts of ownership therein on his part; but that all the acts of ownership over the wastrell and the customary lands, as well as over the freehold lands, except in respect of the tin mines, which was governed by a peculiar law and custom, had been exercised by the freehold and customary tenants, who had for between 20 and 30 years past received dues of copper to a very considerable amount openly from time to time in the face of the lord of the manor or his agents, while he had only received his tin dues. And upon this weight of evidence the learned Judge left it to the jury to find for the defendant: which they did.

Moore now moved for a new trial, and contended that the evidence given on the part of the defendant did not warrant the verdict of the jury with respect to the copper raised under the customary lands and under the wastrell, (the claim as to the copper raised under the freehold being abandoned) against the general presumption of law in favour of the lord's claim to mines under the customary lands and the wastes within the manor, fortified as it was in this case by the undisputed right of the lord to the tin mines under all the lands of the manor, which was decisive to shew that he was entitled to all other minerals in the soil of which the freehold must be taken to be in him. And he relied upon the case of *The Bishop of Winchester v. Knight*, 1 P. Wms. 406, where the freehold of the soil of a customary tenement, though not held ad *valuntatem domini*, but only secundum consuetudinem manerii, was adjudged to be in the lord, and that he was entitled to copper ore raised by the then tenant and his ancestor out of a new mine. [Lord *Ellenborough*, C. J. The ten-

ants here claim the whole soil.] It is said at the conclusion of that report, that there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper mines. That here the taking of copper dues by the tenants was not proved many years back; and it was notorious that no copper mines had been opened in *Cornwall* till within the last century. That with respect to the waste, neither the depasturing by the cattle of the tenants, nor the few instances of taking earth for manure, and stone for building for the use of the customary tenant, shewed any right to mines under the soil; while the lord of the manor had at all times past taken tin, which was evidence to his right to all other minerals; and it was not till of late years that the quantity of copper raised was considerable enough to draw attention to it.

BAYLEY, J. recapitulated the leading facts given in evidence with respect to the acts of ownership by the tenants, in taking copper for between 20 and 30 years past, continually from time to time to a very considerable amount: not less than 7000*l.* worth of copper having been shewn to be raised during this period from the wastrell; and this in the face of the lord, who used to be in the parish every year, and had agents on the spot, and who must have known it. And he stated that he had left it to the jury to determine whether from *these* acts of ownership in working the mines, which were by far the most valuable part of the wastrell, the property was in the tenants or in the lord of the manor, who had exercised no act of ownership there, except that of taking tin, which was under a particular title and custom.

LORD ELLENBOROUGH, C. J. Why may there not be two customs, one for the lord of the manor to have the tin, and another for these tenants to have the copper under their estates, and the waste in question? The usage which establishes the right of the lord to have the one, will also establish the right of the tenants to have the other. And here has been an adverse possession of the copper mines by these tenants for above 20 years past. Besides, if the lord of the manor thinks he can establish his right to the copper by further evidence upon another trial, there is nothing in this verdict to conclude him. The case was properly left to the jury.

Per Curiam,

Rule refused.

Doe, on the Demise of Lawton, v. Radcliffe.

10 East, 278. Nov. 11, 1808.

A lease, at 43*l.* a-year granted under a power directing the *best* rent to be reserved, cannot be impeached merely by shewing that the lessor rejected at the time two specific offers, one of 50*l.* and another from 50*l.* to 60*l.* from other tenants; though the responsibility of such other tenants could not be disproved: for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered: unless something extravagantly wrong in the bargain for rent be shewn. *Semble*, that the *best* rent means the best rack rent that can *reasonably* be required by a landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account.

THE defendant claimed under a lease made in 1799 by the last tenant for life of the estate under a power to lease for the best rent; and the remainderman now endeavoured to impeach the lease, which had been granted at a bona fide rack rent of 43*l.* a-year, by evidence that the last tenant for life before he leased had two offers from other tenants, one at 50*l.*, and the other at near 60*l.* a-year, against whose responsibility nothing appeared. But there was contradictory evidence of opinion as to the value, whether 43*l.* a-year were not a fair rent at the time: and *Lawrence, J.* before whom the cause was tried at *Stafford* left the question to the jury under all the circumstances, who found a verdict for the defendant.

Abbot now moved for a new trial, on the ground that this was a verdict against the evidence; the fact not being controverted, that the late tenant for life received the two specific offers of a higher rent at the time of the lease granted from responsible tenants.

The Court however refused the rule; there being no pretence to impeach the lease on the ground that the letting at 43*l.* a-year was not done *bona fide* by the tenant for life at the time; he not having taken any fine or other consideration for the lease, and having a manifest interest to get the best rent, which under all the circumstances and due consideration had of the ability and good management of the tenant, could reasonably be obtained. And they said, that where the transaction was fair, and no fine or other collateral consideration was taken by the tenant for life leasing under the power, or injurious partiality manifestly shewn by him in favour of the particular lessee, there ought to be something extravagantly wrong in the bargain in order to set it aside on this ground; for in the choice of a tenant there were many things to be regarded besides the mere amount of the rent offered. Rule refused.

Splidt and Others, Assignees of Holmes a Bankrupt, v. Bowles and Others.

10 East, 279. Nov. 11, 1808.

A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage: and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter party.

BY a charter-party of affreightment, made on the 11th February 1801, *Holmes* of *London*, the then owner of the brig *Eliza*, then on a voyage from *Newcastle* to *London*, let her to freight to *Faulder* of *London*, upon a voyage to *Port Mahon* in *Minorca*, with a cargo of coals: and *Faulder* covenanted with the owner, upon condition of his fulfilling all his covenants, to pay freight to the owner or his order at the rate of 5*l.* 6*s.* per keel of 15 *British* chaldrons in *London*, by good bills at 60 days from the receipt of the certificate of delivery, with demurrage at the rate of 5*l.* per day. Soon after the execution of the charter-party the brig arrived from *Newcastle* at *London*, and in April 1801 sailed from thence to *Portsmouth*, where she lay waiting for convoy till August following, when she proceeded on her voyage, and arrived at *Port Mahon* on the 24th of October 1801, and there delivered her cargo: and in March 1802, the certificate of delivery was received by *Faulder* in *London*; and there is due from him for freight 932*l.* 5*s.* and 95*l.* for demurrage. *Holmes*, being considerably indebted to the defendants, in April 1801, deposited with them, by way of security, the bills of sale of the brig *Eliza*, and three other vessels; and on the 14th of September 1801, the debt due from him to the defendants, amounting to 2760*l.*, *Holmes* executed an absolute bill of sale to them of 15-16ths of the said brig: which being then at sea, all the requisites for transferring the property in her from *Holmes* to them were duly complied with, except the indorsement on the certificate of registry required by the stat. 24 Geo. 3. c. 69. s. 15 and 16., which was signed by one of the defendants, by virtue of a power of attorney from *Holmes*, on the 14th of March 1803, being within ten days after the return of the brig to *London*, which was on the 6th of the same month: but the ship being, on the said 14th of September, upon her voyage to *Port Mahon*, every thing remained in the same state with respect to apparent ownership; and the defendants did not take actual possession until her return to the port of *London*. The said bill of sale of the brig was made of 15-16th parts only, because she was then at sea, and to prevent

the necessity of a new register. On the same 14th of *September* 1801, *Holmes* by indenture assigned to the defendants the policy of insurance made by him on the brig: and it was by the indenture agreed that such assignment, and also the bill of sale of the *Eliza*, were made for the purpose of securing to the defendants the payment of the said debt of 2760*l.* and interest. And *Holmes* thereby covenanted, that in case of default of payment according to the covenants therein mentioned, (which default did take place), the defendants might sell the said brig or shares absolutely, and also the said policy of assurance, and convey or assign the same to the purchaser, and receive the purchase-money, and apply the same to the liquidation of their debt and interest, and of all charges, &c.: rendering the overplus, if any, to *Holmes*. On the 21st of *November* 1801, a commission of bankrupt issued against *Holmes*, who was declared a bankrupt, and the plaintiffs were chosen his assignees. After the arrival of the brig *Eliza*, the defendants paid several sums for wages due to the seamen, who had threatened to proceed against the brig, and the said debt of 2760*l.* still remains due. This case came on before the Master of the Rolls upon a bill of interpleader filed by *Faulder*, the freighter; when his Honour directed these facts to be stated for the opinion of this Court, upon the question; Whether the defendants or the assignees of *Holmes* were entitled at law to 15-16ths of the said freight and demurrage? And the case stood for argument in the paper of this day, when *Lawes* was to have argued for the plaintiffs, and *Parnther*, for the defendants; but when it was called on,

Lord ELLENBOROUGH, C. J. said, that if the rights of the parties to receive the freight were to be considered with respect to the charter-party which was stated in the case, no question could be made at law but that the assignees of the bankrupt were entitled to receive it from *Faulder*. For the charter-party was a mere personal contract for the payment of the freight by *Faulder* to the bankrupt, and could not be assigned to the vendees by the transfer of property in the ship. The question sent to us to resolve is, who has the title at law to the freight and demurrage, which are covenanted to be paid by the charter-party; and at law we cannot say that the covenant is transferred to the assignees of the ship by the assignment of the property in the ship, in the same manner as certain covenants are said to run with land. We must therefore certify, that the assignees of the bankrupt under the bankrupt laws, and not the assignees of the ship by the bankrupt's own conveyance, are entitled to the freight and demurrage under the charter-party(a).

The King v. The Inhabitants of Brampton.

10 East, 282. Nov. 12, 1808.

Evidence that *British* subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into *English* by the officiating clerk; which service the parties understood to be the marriage service of the church of *England*, and they received a certificate of the marriage which was afterwards lost, is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years cohabitation as man and wife, till the period of the husband's death.

And such *British* subjects being attached at the time to the *British* army on service in such foreign country, and having military possession of the place, it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of *England*, as a marriage contract *per verba de presenti* before the marriage act; marriages beyond sea being excepted out of that act. And it would make no difference if solemnized by a Roman Catholic priest.

LYDIA, the widow of *Edmund Hudson*, deceased, and their children,

(a) Vide *Chinnery v. Blackbourns*, B. R. E. 24 G. 3. 1 H. Blac. 117. n.

were removed by an order of justices from *Brampton* in *Norfolk*, to *St. Edmund* in *Norwich*; which order was quashed by the Sessions on appeal, subject to the opinion of this Court on the following case.

Lydia the pauper, in 1795, accompanied her then husband, a serjeant of dragoons in the *British* army, to *St. Domingo*, where he died. After his death, in 1796, at *Cape St. Nicola Mole*, in the said island, she became acquainted with *Edmund Hudson*, a serjeant in the 26th light dragoons, then serving there: and both parties wishing to marry each other went to a chapel in the town of *Cape St. Nicola Mole* in order to be married; and there a service was read in the *French* language by a person dressed like a priest, and interpreted into the *English* language by a person officiating as clerk. The pauper *Lydia* did not understand the *French* language, but by the interpreter she understood it was the marriage service of the established church of *England* read in *French*. She did not know that the person officiating was a priest. She received a certificate of marriage, which she has lost. There was no chaplain at that time with the *British* forces in *St. Domingo*. No evidence was given of the laws or usage respecting the marriage ritual in that island. The said *Edmund* and *Lydia* lived together as man and wife till May 1807, when he died; being at the time of his death a settled inhabitant of *St. Edmund, Norwich*. In January 1808, the widow was removed.

Wilson and *Alderson*, in support of the order of Sessions, after observing that the cohabitation of *Edmund* and *Lydia Hudson* stated in the case, being referable to a marriage in fact there stated, must depend, as to its legality, upon the validity of that marriage, contended that the marriage was invalid. 1st, The marriage cannot be supported by the local law of *St. Domingo*, because no evidence was given of that law, by which only it can be ascertained to have been legal there; as was held by Lord *Kenyon* in *Ganer v. Lady Lanesborough*, Peake's N. P. Cas. 18, upon a similar question of divorce. And as far as any fact can be noticed out of the case, it is notorious that the established religion of that country is the Roman Catholic: and the evidence, as far as it goes, negatives that it was by that ritual. 2dly, It is not a good marriage by the law of *England*: for though marriages beyond the seas are excepted out of the prohibition of the marriage act, 26 Geo. 2. c. 33. s. 13, yet, as before that act in *England*, they must be celebrated by a person in holy orders; and therefore in *Haydon v. Gould*, Salk. 119, where the parties were Sabbatorians, and the ceremony was performed according to the rites of their sect, and they had lived together for seven years as man and wife, till the death of the latter; yet the officiating minister being a mere layman, the ecclesiastical Court repealed the letters of administration which had been granted to the husband; and the delegates, on appeal, affirmed the sentence. In Mr. *Fielding's* case, 5 St. Tr. 610, the marriage was celebrated in his own lodgings by a Roman Catholic priest belonging to the suit of the Imperial Envoy: but here there is no proof that the person who officiated was a priest; it only appears that he was habited like one. [Lord *Ellenborough*, C. J. A Roman Catholic priest is so far acknowledged by our church as a person in holy orders that if he renounce the errors of the church of *Rome*, he is a priest without any new ordination.] There is this singularity also attending the marriage, that though performed in a Roman Catholic country, by a *French* priest in his own language, the service was understood to be performed according to the rite of the church of *England*. This consideration might have weighed with the Sessions in inducing them to discredit, as they have done by their order, the whole transaction.

The Court here observed, that they must assume that the Sessions believed the facts sworn to, which are stated in the case, otherwise they would not have reserved the question for their opinion.

Peake and *Frere*, contra, maintained that there was evidence of a good marriage both by the laws of *St. Domingo* and of *England*. As to the first,

there is evidence of a ceremony having been performed which the parties meant and understood to be the ceremony of marriage; and it was performed in a public place of worship, and in a public and solemn manner, by a person habited like and believed to be a priest, and officiating as such: these facts therefore raise a presumption that the ceremony was legally performed according to the law of the country, unless the contrary be shewn. But if that were doubtful, 2dly, it was a good marriage by the law of *England* as it stood here before the marriage act, and as it now stands with respect to marriages beyond sea, which are excepted out of that act. In *Haydon v. Gould* it was found as a fact, that the person who officiated as minister was a layman; and that decision went upon the ground, that as the husband demanded a right in the ecclesiastical court, which was only due to him by the ecclesiastical law, he must prove himself a husband according to that law. But the Court seem to have distinguished his claim from that of the wife or issue entitling themselves by such marriage to a temporal right. And in *Jesson v. Collins*, Salk. 437, and 6 Mod. 155, where a prohibition was moved for to stay a suit in the spiritual court upon a contract of marriage *per verba de presenti*, upon a suggestion that it was *per verba de futuro*, the writ was denied: it being a matrimonial question of which that court had jurisdiction: and Lord C. J. Holt said, that a contract *per verba de presenti* was a marriage: viz. "I marry you:" "you and I are man and wife." And in the report of the same case in 6 Mod. 155, he says, that such a contract "amounts to an *actual marriage*, as if it had been *in facie ecclesie*." And in this all the Court agreed. Dyer 369. a. is to the same effect. In *The King v. Fielding*, 5 St. Tr. 610, the marriage here by a Roman Catholic priest was held good, on evidence of the words of present contract, which were spoken in English; the rest of the ceremony being read in the Latin tongue, which the witness present did not understand. Though the curtesy of the law of *England* recognizes marriages in a foreign country celebrated according to their law; it does not follow, that a marriage between English subjects according to the law of *England* would not be good, if celebrated in a foreign country; though not according to their law. Marriages by English subjects have often been made abroad in the chapels of our ambassadors. [Lord *Ellenborough*, C. J. If made by the allowance of the foreign state in such places, they would be good marriages in those countries. But if not a good marriage in the place where it is celebrated, it cannot be a good marriage any where.] Still if celebrated openly in that country, the presumption is, that it is good there: and the *onus* of shewing that it is void lies on the party who disputes it. It is at least evidence that it was allowed by the curtesy of the foreign state. Lord *Mansfield* in *The King v. Stockland*, Burr. S. C. 509, considered the mere cohabitation together as man and wife for 30 years as evidence of a marriage on a question of settlement, and the only exceptions made to the rule in *Morris v. Miller*, 4 Burr. 2059, were in prosecutions for bigamy(a) and in actions for criminal conversation. Upon a late prosecution for bigamy at *Guildford*, before the Lord Chief Baron, where the first marriage was at *Gretna Green* in *Scotland*, his Lordship refused to receive evidence of the law of *Scotland* in respect to the legality of such marriage from the witness who was a tobaccoconist.

LORD ELLENBOROUGH, C. J. The facts are shortly these: a soldier on service with the *British* army in *St. Domingo* in 1796, being desirous of marriage with the widow of another soldier who had died there in the service, and both parties being desirous of celebrating their marriage with ef-

(a) Vide the report of *Morris v. Miller* in 1 Blac. 682. where the Court refer to the case of an indictment for bigamy on the *Norfolk* circuit, in which *Denison, J.* ruled, that "though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shewn." This it seems must be understood where there is *prima facie* evidence of a lawful marriage.

fect, they went to a chapel in the town where they were, and there the ceremony was performed by a person appearing there as a priest and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk; and which the pauper understood at the time to be the marriage service of the church of *England*. After this they cohabited together as man and wife for 11 years, until the death of the husband. And now it is made a question upon these facts, which we must take it the Sessions believed to be true, otherwise they would not have stated them to us for our opinion, whether this were reasonable evidence of a marriage in *St. Domingo* at that time, upon which the Sessions ought to have adjudged the settlement of the wife to be in the husband's parish. First, considering it as a marriage celebrated in a place where the law of *England* prevailed: for I may suppose in the absence of any evidence to the contrary, that the law of *England* ecclesiastical and civil was recognized by subjects of *England* in a place occupied by the King's troops, who would impliedly carry that law with them. It is then to be seen whether this would have been a good marriage here before the marriage act. Now certainly a contract of marriage *per verba de presenti* would have bound the parties before that act; and this appears to have been *per verba de presenti*, and to have been celebrated by a priest, that is, by one who publicly assumed the office of a priest and appeared habited as such: of what persuasion indeed, whether Roman catholic or protestant, does not appear. But even if it were performed by a Roman catholic priest, that would not vary the case; for such a person would be recognized by our church as a priest capable of officiating as such, upon his mere renunciation of the errors of the church of *Rome*, without any new ordination. But the case of *The King v. Fielding* is in point to shew that a marriage by a Roman catholic priest (before the marriage act) was effectual for this purpose. That was a marriage in *England* by a Roman catholic priest in the year 1705, before the marriage act: and upon evidence that the prisoner, in answer to the question, whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. *Fielding* for her husband; Mr. Justice *Powell*, upon a question of felony, considered it as a marriage contracted *per verba de presenti*; in like manner as it was considered by Lord *Holt* in *Jesson v. Collins*. And here there is this further circumstance, that the ceremony was performed in a public-chapel, instead of in private lodgings, as it was in Mr. *Fielding's* case. Considering the case therefore to be, that the King's forces carried with them the law of *England* to *St. Domingo*, by which they and other subjects who accompanied them (in the absence of proof that any other law was in force there) may be considered as continuing to be governed; this would be a good marriage by that law. But supposing the law of *England* not to have been carried to *St. Domingo* by the King's forces, nor obligatory upon them in this particular, let us consider whether the facts stated would not be evidence of a good marriage according to the law of that country, whatever it might be. And indeed after the ceremony of marriage, as it was understood and intended by the parties at the time to be performed openly in a chapel, by a person appearing there as a priest authorized to perform the ceremony of marriage; and this followed by a cohabitation between the parties as man and wife for 11 years afterwards; every presumption is to be made in favour of its validity. I should have considered myself as safe in resting my opinion in favour of this marriage upon the law of *England* as it exists independent of the provisions of the marriage act. But without the aid of that, I think every presumption must be made in favour of its validity according to the law of the country where it was so celebrated; (1) having been

(1) As to the validity of marriages celebrated in a foreign country, and the operation of the *lex loci* upon contracts generally, see note 1. by *Hargrave* to Co. Litt. 79. b, and additions by *Day*.

performed there in a proper place, and by a person officiating as one competent to perform that function.

GROSS, J. The question is, whether this were a good marriage? And in determining that, I have no objection to consider whether it be a good marriage either according to the law of *England*, or according to the law of the country where it took place. Upon the former ground, I rather think that it was good by the law of *England* for the reasons which have been stated by my Lord. But considered as a marriage by the law of the country where it was celebrated, I think there can be no doubt. The parties meant to be married: they went openly to a chapel in the country where they were; they found there a person appearing as a priest of the country, and they were married by him: the service was performed in French, but it was translated to the parties, and they understood it to be the marriage ceremony. From these facts the presumption would be, that it was a marriage according to the law of that country, by a priest of that country cognizant of its laws in that respect, and who it must be presumed would celebrate it according to the law of his own country. There is therefore a fair and reasonable presumption that these parties were regularly and legally married according to the law of *St. Domingo*. I should think the marriage might be sustained according to the law of *England*, but I have no doubt that it is sustainable by the law of the country where it was celebrated.

LE BLANC, J. The Sessions have stated to us the facts proved in evidence before them, and they desire to know what is the legal conclusion from that evidence. They state in substance, that the parties named, being in *St. Domingo*, and wishing to be married, went in 1796 to a place of worship in that country, and were married by a person appearing there as the priest, and that they have since cohabited as man and wife till his death in 1807. And the question is, whether this be not sufficient evidence that the marriage was properly celebrated. It is no objection to it for the woman to say that she did not *know* that the person officiating was a priest; for the same answer would probably be given by most persons who are married here. They must for the most part say, that they did not *know* that the person who officiated was a priest: but it would be sufficient evidence of the marriage that the ceremony was performed by a person officiating as a priest in a regular place of marriage. And this answer of hers was no reason for the Sessions to say, that the marriage was not performed by a person in holy orders.

BAXLEY, J. The facts stated are strong evidence of a marriage; and I cannot presume from any of these facts that the person who officiated was not a priest in holy orders, or indeed that he was a Roman catholic priest. He officiated as a priest in an appropriate place in the country and married these parties; and after so many years cohabitation as man and wife since that period, I cannot possibly say but that this was evidence of a marriage(1).

Order of Sessions quashed.

The King v. The Inhabitants of the Township of Killyerby.

10 East, 292. Nov. 12, 1808.

Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not in his own, but in his son's name, for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish.

WM. FURGUSSON, his wife, and family, were removed by an order of

(1) [See all the learning upon this subject collected in the 20th chap. of Poynton on Marriage and Divorce, and the 6th chap. of Story on the Conflict of Laws.—W.]

justices from *Cleatham* to *Killerby*, in the county of *Durham*; and on appeal the order was confirmed at the *Easter Sessions*, subject to the opinion of this court upon the following case.

George Dent, the master of the pauper, was offered as a witness on the part of the appellants, but was rejected by the Court. Upon the *voir dire* it appeared, that *Dent* had rateable property in *Killerby*, but was in fact not rated for it at the time of hearing the appeal. He was however rated for it at the time of lodging the appeal at the *Christmas Sessions* preceding, but his name was omitted out of the rate made for *Killerby* in the last *Easter* week, for the purpose of rendering him a witness at the hearing of the appeal, at which time the property still belonged to him, though it was in fact rated in the name of his son, who had no interest therein.

Raine was to have argued in support of the decision of the Sessions, that *George Dent* was an incompetent witness; but the Court thought it unnecessary to hear him. And

Hullock, contra, briefly insisted that only the legal interest of the witness could be regarded; and that he, having been struck out of the rate, was not legally liable to the payment of it.

LORD ELLENBOROUGH, C. J. The property rated belonged wholly to the father, who was tendered as a witness: the son had no interest in it; and whatever he paid towards the rate must have been allowed again to him by the father. The parties here meant to commit a fraud, but did not know how to do it with effect.

GROSE, J. The father's property is still rated, though his name has been fraudulently left out of the rate.

LE BLANC, J. The witness tendered had property which was rated in the parish, though in another name, that of his son who had no property there: and this distinguishes it from all the cases where persons having rateable property, which was not in fact rated, were held to be competent witnesses (a).

BAYLEY, J. assented(1)(2).

Order of Sessions confirmed.

(a) Vide *Rex v. Kirdford*, 2 East, 559, where all the cases are collected.

(1) In *England* though the members of a corporation are not universally excluded where the corporation to which they belong is interested in the event: yet if the interest of the individual offered is to be affected by the event of the suit, he is incompetent. *The County of Salop v. The County of Stafford*, 1 Sid. 192. *Dodswell v. Nott*, 2 Vern 317. *Brown v. Corporation of London*, 11 Mod. 225. *Attorney General v. Wyburgh*, 1 P. Wms. 599. *Burton v. Hinde*, 5 Term Rep. 174. If a parishioner be not in fact rated, though liable to be rated, his interest is not affected; and he is therefore admissible. *Rex v. Prosser & al.* 4 Term Rep. 17. *Rex v. South Lynn*, 5 Term Rep. 667. *Rex v. Little Lumley*, 6 Term Rep. 157. *Rex v. Kirdford*, 2 East, 559. This rule of the *English* law has been fully recognized in the state of *New-York*. *Jacobson v. Fountain*, 2 Johns. 70. *Full & al. v. Belknap*, 1 Johns. 486. In *Connecticut*, a different rule has been adopted: That where the corporation is of a public nature, and comprehends a division of the state, as a county, a town, a society, or a school district, the members are competent witnesses in suits in which such corporation is a party, or has an interest; but if the corporation is of a private nature, instituted for special purposes, as banks, insurance companies, turnpike companies, &c. the members are not allowed to testify. *Swift's Ev.* 57. See *Smith exr. of Grant v. Barber*, 1 Root, 207. *Shelton v. Tomlinson*, 2 Root, 132. *Cornwell v. Isham*, 1 Day 35. See also *Schank v. Stephenson*, 1 Penn. 387. decided in *New-Jersey*.

(2) [See in *Penns. Respublica v. Richards*, 1 Y. 480. *Grayble v. York Co.* 10 S. & R. 269. *Bank of Swatara v. Green*, 3 W. 374. *Com'rs v. Baird*, 4 S. & R. 141. *Thornbury v. Directors of the Poor*, 12 do. 110. *M'Farland v. Commrs. of Moyemensing*, 12 do. 297. *Croger v. Leland*, 4 Wh. 12.

See, in *Massachusetts*, *Emerson v. Newbury*, 13 Pick. 377. *Mill Dam Foundry v. Hoey*, 21 do. 417. *Bristol v. Slade*, 23 do. 160.

The stat. 54 Geo. 3. c. 170. s. 9. has changed the law as laid down in the text, and as had been well settled in *England*. For remarks upon this statute, see 1 Stark. Ev. 159, 160. and notes. See also, *Doe v. Cockell*, 6 C. & P. 525. 4 Ad. & Ell. 478.—W.]

Hollis and Another Administrators, &c. v. Smith.

10 East, 293. Nov. 12, 1808.

Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, are liable to costs; for the fact of their possession is immaterial; and they may sue in their own right.

THE plaintiffs sued in trover as administrators, and declared in one count for a loss of goods in the lifetime of the testator, and the trover and conversion after his death by the defendant; and in a second count they declared on their own possession of the goods, and the subsequent trover and conversion. And having been nonsuited without any evidence, and the Master having disallowed the defendant his costs; *Abbott* obtained a rule for the Master to tax the costs; against which *Wigley* now shewed cause, and relied upon *Cockerill v. Kynaston*, 4 Term Rep. 277, where the executor declared in one count on a trover and conversion in his testator's life-time and in another count on a trover and conversion after his death; and the evidence offered, being only applicable to the first count, he was held not liable to pay the costs of a nonsuit. And *Buller*, J. there took a distinction, that if the goods never were in the actual possession of the executrix, it was absolutely necessary for her to declare in that character. And here no evidence having been given, it did not appear that the goods ever were possessed by the plaintiffs.

LORD ELLENBOROUGH, C. J. That opinion was overruled in *Bollard v. Spencer*, 7 Term Rep. 358. The action is founded upon the plaintiff's property, and it is immaterial whether they were in fact possessed of it or not, before the conversion by the defendant. And this latter case was recognized by Lord Eldon in *Tattersall v. Groote*, 2 Bos. & Pull. 256, where, though an administratrix suing on a covenant(a) with her testator was held not liable to costs; yet all the decisions in trover the other way were left untouched by that judgment. It was once endeavoured by Mr. Justice Buller to make it the test of an executor's exemption from costs, whether the money, when recovered in the action would be assets: but that is certainly not the rule now. The question is, Whether it were necessary for the plaintiffs to have declared as administrators? and here it certainly was not necessary; for on the death of their testator they were in point of law the owners of goods which belonged to the intestate: and whether actually possessed by them or not before the conversion, they might declare as any other person upon their own property when wrongfully converted by another.

BAYLEY, J. referred to *March v. Yellowby*, 2 Stra. 1107, assigning the reason why executors shall be liable to costs in these cases, which arises upon the words of the stat. 23 H. 8, c. 15(1).

Per Curiam,

Rule absolute(2).

(a) The same answer was given to *Cook v. Lucas*, 2 East, 395, which was also cited.

(1) As to the liability of executors and administrators to costs, see *Frink & al. ads. Luyten*, 2 Bay 166. *Vanderhorst's exrs. v. Whitner*, 2 Bay 399. *Thornton exr. of Champ v. Jett*, 1 Wash. 138. *Carr's exr. v. Anderson*, 2 Hen. & Munf. 361, 369. *Rudd & al. exrs. of Cable v. Long*, 4 Johns. 190. *Kellogg's admrs. v. Wilcocks*, 2 Johns. 377. *Mahany's exrs. v. Fuller*, 2 Johns. Ca. 209. *Carlisle's admr. v. Bates*, 8 Johns. 379.

(2) [See also *Bradford v. Bondmot*, 3 W. C. C. R. 122. *Musser v. Good*, 11 S. & R. 247. *Armstrong's Estate*, 6 W. 236. *Hardy v. Call*, 16 Mass. 530. *Brooks v. Stevens*, 2 Pick. 68. *Healy v. Root*, 11 Pick. 339. *Patchen v. Wilson*, 4 Hill. 57.—W.]

Ritchie v. Atkinson.

10 East, 295. Nov. 15, 1808.

Where the master and freighter of a vessel of 400 tons mutually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed proceed to *St. Petersburg*, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to *London* and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* per ton, &c.: one half to be paid on right delivery, the other at 3 months: held that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery.

THIS was an action of indebitatus assumpsit for the freight of goods conveyed in the ship *Adelphi*, of which the plaintiff was master, from *St. Petersburg* to *London*, and delivered to the defendant or his order. There was also a count on a quantum meruit for freight, and the common counts for work and labour, and for money paid, &c. The defendant pleaded the general issue; and at the trial at *Guildhall* before Lord *Ellenborough*, C. J. a verdict was found for the plaintiff for 960*l.* 15*s.* subject to the opinion of this Court on the following case.

The plaintiff being master of the ship *Adelphi*, in *August* 1807 chartered her to the defendant by the following instrument: "Memorandum for charter. *London*, 12th *August* 1807. It is this day mutually agreed between Captain *J. Ritchie*, of the ship *Adelphi*, burden 400 tons or thereabouts, now in the river, and *W. Atkinson*, of *London*, merchant, that the said ship, being tight, and every way fitted for the voyage, shall with all convenient speed sail and proceed to *St. Petersburg*, or so near thereunto as she may safely get, and there load from the factors of *Wm. Atkinson*, a complete cargo of clean hemp, and 80 tons of iron for ballast, not exceeding what she can reasonably stow, &c.; and being so loaded shall therewith proceed to *Woolwich* and *London*, and deliver the same, on being paid freight for clean hemp 5*l.* per ton, for ballast iron 5*s.* per ton, with two-thirds port charges and pilotage as customary; restraint of princes and rulers during the said voyage always excepted: one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in 3 months following. Thirty running days are to be allowed the said merchant, (if the ship is not sooner dispatched,) for loading her at *St. Petersburg*, and thirty running days for delivery at *Woolwich* and *London*, and ten days on demurrage over and above the said laying days at 6*l.* per day. Penalty for non-performance of this agreement 2000*l.* The ship to sail with convoy from the *Sound* for *England*. *Wm. Atkinson.*" The *Adelphi* sailed in ballast from *Deptford* on the 24th of *August* 1807, and arrived at *Cronstadt*, the port of *St. Petersburg*, on the 16th of *September* following; where the plaintiff proceeded to take in her cargo under the charter-party, and continued loading her with all due diligence until the 25th of *September*, and had then taken on board between 70 and 80 tons of iron for ballast, the same being a sufficient quantity for ballast, and a considerable quantity of hemp. On the 26th of *September* there was a general rumour of an embargo being intended to be laid by the *Russian* Government on all *British* vessels; and there was every appearance that it would take place immediately; but it did not in fact take place then, nor until six weeks afterwards: but on the 25th of *September* Mr. *Booker*, the agent for the *British* factory at *Cronstadt*, and also the agent to the house of *Hubbard* and Co. the defendant's agents, in consequence of instructions that he had received from Sir *Stephen Shairp*, his Majesty's Consul General at *St. Petersburg*, desired the captains of such *British* vessels as were ready to proceed to sea, to do so as soon as possible, as he expected an embargo might take place immediately. [The case then

set out a circular letter of advice to that effect, written to the captains of *British* vessels by the consul's agents. In consequence of which the plaintiff gave directions to leave off screwing down any more hemp, which is the usual mode of loading, and to fill the ship up as fast as possible by hand; and the whole of this day was occupied in loading the vessel in this manner till 6 o'clock; at which time she was filled up as far as could be done by hand: and the ship sailed on the evening of the 25th of *September* with a cargo more than half what she could have carried, though there was at the time as much hemp of the defendant's lying in lighters alongside of the vessel as would have completely loaded her. The plaintiff acted bona fide and as an honest man under the existing circumstances, and there was a reasonable and well grounded apprehension for his acting as he did; and he brought home as complete a cargo as he could under the circumstances. Several other vessels sailed the same evening as the *Adelphi*. All or almost all the vessels which had passes sailed either the same evening or the next morning without full cargoes, under the apprehensions of an embargo: but some other *British* vessels did not sail from *Cronstadt* at that time, and were not detained, but completed their loading: and if the *Adelphi* had staid, she might have completed her loading. The plaintiff sailed without any previous communication with *Hubbard and Co.*, the defendant's agents, to whom he was addressed; they residing at *St. Petersburg*. As soon as they had notice of the circumstances they immediately came to *Cronstadt* with an intention to stop the ship, but it was too late: and they then formally protested against him for breach of his charter-party. The *Adelphi* arrived in *London* and delivered her cargo there to the defendant, who refused to pay the freight, as little more than a moiety of the quantity of hemp stipulated by the charter-party was brought by the plaintiff. The freight of the iron and hemp so brought to *London* and delivered to the defendant amounted, according to the rate stipulated in the charter-party, to 960*l.* 15*s.* And the verdict for that sum was to stand, if the Court thought that the plaintiff was entitled to recover; otherwise, a nonsuit was to be entered.

Littledale contended, that the plaintiff was entitled to recover freight on the charter-party in proportion to the cargo, although he had not brought home a complete cargo; the delivery of a complete cargo not being a condition precedent, nor the payment stipulated for entire, but to be made at the rate of so much per ton on the different articles brought home and delivered, and therefore in its nature apportionable. The words, "*and deliver the same,*" are equivocal, and may mean the cargo actually delivered, as well as the whole quantity stipulated for; and the former is the more reasonable construction, especially in a mercantile instrument; because the plaintiff would then be entitled to receive the just proportion of freight which he had earned: and if by negligence he did not bring home so complete a cargo as he might have done, the defendant would have a remedy against him upon his covenant. The true rule in these cases was laid down by Lord *Mansfield* in *Boone v. Eyre*(a), that "where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions: but where the covenants go only to a part, and where a recompence may be had in damages, it is a different thing:" and this was recognised in *Campbell v. Jones*, 6 Term Rep. 573, and *The Duke of St. Albans v. Shore*, 1 H. Blac. 278. That doctrine must at all events apply to a case where the amount of the freight was to be ascertained pro rata. As in *Thompson v. Noel*, 1 Lev. 16, and 1 Keb. 100, where the master of a ship covenanted to go to *Ireland* and there take in 280 men from the defendant and carry them to *Jamaica*; and the defendant covenanted to have the 280 men ready, and to pay 5*l.* a man for their conveyance: though the defendant pleaded that he had all the men ready, and tendered them to be carried, and the plaintiff only took and carried 190 of them: yet it was held on demurrer

(a) B. R. Easter, 17 Geo. 3. 6 Term Rep. 573, and in 1 H. Blac. 278. n.

to the plea that he might recover, because the plea was only an answer to part of the declaration : that is, though the plea in bar shewed that the plaintiff had not performed the whole of what he covenanted to do ; yet giving no answer to the part which he had performed, he was held entitled to judgment. But, 2dly, though the delivery of a complete cargo were a condition precedent, according to the terms and intent of the contract, yet the defendant having received that part of the cargo which was brought home, the plaintiff is entitled to recover upon a quantum meruit, in respect of the service done, as upon a new cause of action. For though in *Cook v. Jennings*, 7 Term Rep. 381, upon a covenant to pay so much freight for goods delivered at A., it was held that freight could not be recovered upon the covenant, pro rata itineris, where the ship was wrecked at B. before her arrival at A., though the defendant had accepted the goods at B. ; yet *Lawrence, J.* seemed to consider such receipt of the goods by the owner as evidence of a new contract between the parties. And *Luke v. Lyde*, 2 Burr. 882, and 1 Blac. Rep. 190, went upon that principle : as did also *Lutwidge v. Grey and others* in Dom. Proc. 1733, there cited (a), and the case of the *Copenhagen*, in the Court of Admiralty, 1 Rob. Ad. Rep. 299. The case of *Bright v. Cowper*, 1 Brownl. 21, which seems to bear the other way, was an action of covenant, and it does not appear whether the action was brought for the whole or only a proportionable part of the freight. Besides, by the terms of this contract the plaintiff was not bound to deliver the cargo, without receiving payment of half of the freight at the time, and the remainder in three months afterwards : by receiving therefore less than the complete cargo, which the plaintiff was not bound to deliver without a tender of the half freight, the defendant impliedly agreed to pay for the part so received. [Lord *Ellenborough, C. J.* I do not see how the receipt of the goods changes the situation of the parties ; because these were the defendant's own goods ; and unless freight were due upon them by the contract, the defendant was entitled to have his own goods without any consideration. It was therefore only taking peaceable possession of that, for which, if wrongfully withheld, he might have brought trover. But on the other ground, the plaintiff may contend with strong effect, that the defendant's argument must go this length, that if the cargo wanted a single ton of being a complete cargo, it would be a defence to this action for the freight.] The plaintiff might have gone back again to *St. Petersburg*, for the remainder of the cargo, and was not bound to have delivered a part only of it : and the convenience of receiving the part brought home would be a good consideration to the defendant from whence to imply a new promise to pay for it.

Taddy contra. The covenant to bring home a complete cargo is a condition precedent to the plaintiff's right to recover freight upon the contract. It is necessary for the safety of merchants that these charter-parties should be strictly executed ; and the late case of *Smith v. Wilson*, 9 East, 437—445, proceeded upon that principle, although the freight there was covenanted to be paid at so much per month during the voyage out to *Monte Video* and back again to the port of discharge. The case of *Bright v. Cowper*, 1 Brownl. 21, was there relied on by the Court ; and it is immaterial whether the action was brought for the whole or a proportion pro rata of the freight ; for the action of covenant sounding in damages, a part only might be recovered, though the plaintiff declared for the whole. And the same argument might have been urged in *Cook v. Jennings*, 7 Term Rep. 381 ; but the Court held the performance of the whole voyage a condition precedent to the recovery of any part of the freight. There is no difference in this respect between a contract under seal, or by parol. The construction in both cases proceeds on the ground, that if the parties have stipulated for themselves, whether reasonably or not, the Court cannot stipulate for them. The substance of the

(a) This case is given at length by Mr. *Abbott*, in his *Law of Merchant Ships, &c.* 280. Vol. V.

contract in *Boone v. Eyre* was the conveyance of the estate; and the exact number of negroes on it was only the subject of an independant covenant; and any deficiency in the number might be compensated in damages without affecting the title to the estate. In *Campbell v. Jones*, 6 Term Rep. 570, a particular sum was covenanted to be paid on a given day at all events, which might arrive before the instruction covenanted to be given by the other party; and consequently such instruction could not in the nature of the thing be a condition precedent to the payment of the money on the day. *Tompson v. Noel*, 1 Lev. 16, seems indeed the other way; but there the covenant applied only to the number of men who were to be carried out at so much per head; which may perhaps make a difference: but a *complete cargo*, which was covenanted in this instance to be brought home, is in its nature an entire thing, depending on the capacity of the ship. [*Grose, J.* Does it not depend on the intention of the parties, to be collected from the whole instrument, whether the completion of the cargo was to be a condition precedent to the payment of any freight; and could it have been their intention that if the cargo wanted ever so small a quantity to complete the loading of the ship, that the plaintiff was to receive nothing for that which he brought home?] It may easily be conceived to have been the meaning of the parties, that if the master refused or neglected to take in any part of the cargo, however small, which was ready for him, he should not receive any freight: and that the only effectual way of preventing the omission, whatever the motive might be, was by making the completion of the cargo a condition precedent. Then if so, the acceptance here by the defendant of an incomplete cargo, being his own goods, cannot make any difference. And as to the argument that the plaintiff might have gone back to *St. Petersburg*, and have refused to deliver any part of the cargo till he had completed the whole; the answer is, that he has brought his action before he has so done. Or at any rate he ought to have declared differently, by stating the partial performance of the original contract, and that in consideration that he would deliver the part of the cargo which had been first brought home, the defendant promised to pay freight pro rata. But a general indebitatus assumpsit cannot be maintained by a party under contract until the whole duty is performed. [*Lord Ellenborough, C. J.* There is a covenant by the plaintiff that the ship shall proceed with all convenient speed to *St. Petersburg*, and there load a complete cargo; and that would not be satisfied by the plaintiff bringing part of the cargo at one time, and then going back and bringing the remainder of it: and therefore we may lay that, which is not the material part of the case, out of the question, and consider whether the completion of the cargo be a condition precedent.] In *Hadley v. Clarke*, 8 Term Rep. 259, the defendant, having contracted to carry the plaintiff's goods from *Liverpool* to *Leghorn*, was held liable in damages for the non-performance of his contract at the end of two years, during which time the ship was under an embargo of our own government to *Falmouth*, in her way out. And *Laurence, J.* referred to All. 27, "that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." As to *Lutwidge v. Grey*, Abbott's Law of Merchant Ships, 280, and *Luke v. Lyde*, 2 Burr. 883, the master in each had done all that he could, and had forwarded the goods or offered to complete the voyage; but the owner preferred to take them at another place. He then argued the case upon the marine law, as far as it could be collected from local ordinances and general opinions; and referred to 1 Valin. 626, 2 Poth. 393, 4. 2 Mag. 162. 1 Moll. 327, and Mal. Lex. Merc. 9S. 100, *Malynes*, in one of these passages, mentions a case of five ships which were freighted out and home in 1687, but from some apprehension of being taken returned without their lading; Two of them having staid out all their time in the foreign ports, and

protected against the factors of the freighters from whom they were to have received their lading, were adjudged by the law of admiralty to have deserved their whole freight: but two others who had not staid their abiding days, nor protested, were found not to have deserved any freight at all, though they were laden outward bound. The fifth ship, under the like circumstances as the two last, had half her freight by a particular proviso in her charter-party. In p. 100, treating on "questions about freightings and their solutions," he says "If freight be agreed upon for commodities to be laden for a certain price for every pack, &c. without regard to the burthen of the ship, but to give her the *full lading*, no man maketh doubt but that the same is to be performed accordingly." [Lord *Ellenborough*, C. J. No doubt if the master do not bring home a full lading, the other shall recover: but the writer does not say that that is a condition precedent to the claim of freight in proportion to what is actually brought home. In all the cases of conditions precedent the thing to be done is some indivisible thing: but the delivery of a cargo of goods is not one entire thing, but in its nature divisible.

Littledale, in reply, observed on the loose and doubtful opinions of the writers on the marine law, from whence no certain rule could be drawn; though in the very instance quoted, *Pothier* and the others admit that something is to be paid where the master is in no fault. But the intention of these parties, (the material object of inquiry,) that the freight should be paid in proportion to the quantity of the cargo, is manifest from fixing the rate of payment by the ton; for, otherwise, if the cargo had been meant to be one entire thing of a given tonnage, the bringing home of which was to be made a condition precedent to the demand of any freight, one certain sum only would have been stipulated to be paid on the performance of the one entire duty. On the other point; if the expected embargo justified the carrying away the ship till the expectation of danger was removed, the returning afterwards for the remainder of the cargo would be a performance of the voyage *with all convenient speed*. But it has not been thought necessary in this case to argue the question of the embargo, which will arise in another case now standing for argument. As to *Smith v. Wilson*, 8 East, 437, the owner did not do every thing in his power to earn the freight which he sought to recover, but merely offered to prosecute and complete the voyage, in the progress of which he had been interrupted for a time. That, therefore, was the case of a failure in the very substance of the contract, the performance of which was to entitle the plaintiff to freight. But a covenant to sail with the first fair wind has been held, *Constable v. Cloburie*, Palm. 397. *Hall v. Cazenove*, 4 East, 477. 483. and *Bornmann v. Tooke*, 1 Campbell's N. P. Cas. 377, not to be a condition precedent to the recovery of the freight.

Lord *ELLENBOROUGH*, C. J. If the delivery of a complete cargo were a condition precedent to the recovery of any freight, no doubt the defendant would be entitled to require the strictest performance of it: but the question is, Whether it be a condition precedent? and that depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract: whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend upon the performance of the other.* The rule was well laid down by Lord *Mansfield*, in *Boone v. Eyre*, 1 H. Blac. 273. and 6 Term Rep. 573, that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a *part*, there a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent. That was a case where the plaintiff had conveyed to the defendant a plantation in the *West Indies*, with the negroes on it, and had covenanted that he had a good

* [See *Wright v. Smith*, 4 W. & S. 527.—W.]

title, and was lawfully possessed of the negroes; and the defendant covenanted, that the plaintiff, well and truly performing all and every thing in the deed contained on his part to be performed, he, the defendant, would pay a certain annuity. And to an action on covenant for non-payment of the annuity the defendant pleaded, that the plaintiff was not at the time legally possessed of the negroes, and so had not a good title to convey. But, on demurrer, Lord *Mansfield* said, that if such a plea were to be allowed, if any one negro were not the property of the plaintiff, it would bar the action. He must therefore have considered that such a covenant was in its nature apportionable according to the damage sustained by the breach of it, and did not make a condition precedent to the payment of the annuity. Now apply that to the present case. Here is a ship of about 400 tons, which is freighted to go to *St. Petersburg*, and to bring home a complete cargo of hemp and iron, and to deliver the same on being paid freight so much per ton on each commodity. If the owner be not entitled to recover freight for any proportion of goods he may bring home short of a complete cargo, and it should appear by any subsequent admeasurement of the vessel, even after the delivery of the cargo, that there was wanting some small fraction of a complete cargo; if the ship had been supposed to measure 400 tons, and a cargo adapted to that proportion had been loaded, and it turned out that she measured 10 or 20 tons more; the owner would altogether be defeated of his remedy for the whole freight. But would not such a construction be contrary to common sense and the true nature of such a contract; and can any such meaning be fairly inferred from the terms of it? But it is said that a different construction will bear hard upon the merchant who has stipulated for the delivery of a complete cargo. It does not follow, however, from thence, that if there has been an imperfect delivery, he will be ousted of his remedy: for clearly an action on the case lies against the captain who has made an imperfect, when he could have made a perfect delivery. But I should require the strongest authority to be adduced before I held that this was a condition precedent, when the consequences of such a construction would be such as I have before stated. There is no case, however, where the delivery of less than a complete cargo has been held not to be apportionable. Where, as in *Smith v. Wilson*, 8 East, 487, the freight is made payable upon an indivisible condition, such as in that case the arrival of the ship with her cargo at her destined port of discharge; such arrival, &c. must be a condition precedent; because it is incapable of being apportioned: but here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery; leaving the defendant to his remedy in damages for the short delivery. And all the cases of conditions precedent have been where the thing to be done was a strict indivisible condition. The same may be said of the case of the five ships mentioned from *Malynes*, which were freighted out to *Leghorn* and *Civita Vecchia*, there to remain a certain time and take in their lading and return home; and some of them came away without any lading, before the precise time stipulated for their abiding there to be laden had expired. In this case, however, the condition is divisible, and the real justice of the case will be attained by the plaintiff's recovering his freight in the proportion per ton of the goods delivered; and the remedy of the defendant will still be entire to punish the master for his imperfect and wrongful delivery.

GROSE, J. It is not a condition precedent to the claim of freight that a complete cargo should be delivered. The agreement, however, does contain a condition precedent in one part; for the payment of the freight is made a condition precedent to the delivery of the cargo; the master being to "deliver the same on being paid freight." This is strong to shew that the parties knew how to make a condition precedent where it was so intended: but they have not done so in the instance now in question. And to construe the delivery

of a *complete* cargo to be a condition precedent to the right to recover any freight would be manifestly unjust; because if default were made in ever so small a proportion of that which would be a complete cargo, the master would not be entitled to any freight for however large a proportion of goods he may have delivered. The reasonable construction therefore is, that the plaintiff should receive freight according to the quantity per ton which he has delivered. But it is said that the intention of the parties was that the defendant should receive a *complete* cargo, as much as could be stowed in the ship; and that this was a material stipulation to be performed for his benefit. I will not say now that it was not so: but taking it to be so, the defendant has his remedy for the breach of it. If either of the parties break his part of what he has engaged to do, he will be answerable to the other. In this way perfect justice will be done to both: but not so if the delivery of a *complete* cargo were made a condition precedent to the payment of any freight: and therefore I do not think that it was the intention of the parties to make it so. The cases, where acts stipulated to be done by one party have been held to the conditions precedent to the claim of the other, have been where it appeared upon the face of the contract to have been the intention of the parties that the one thing should not be done by one party till something else had been done by the other. But no such intention appears here.

LE BLANC, J. The question depends on the construction to be put upon this instrument; whether we can see from the whole of it that it was the intention of the parties that the delivery of a *complete* cargo should be a condition precedent to the recovery of any freight at all. This rule was laid down in one of the early cases, *Kingston v. Preston* (a), which has been since followed in others. Now the delivery of the cargo was in its nature divisible; for it consisted of hemp and iron, the freight of which was to be paid for by the ton, according to a different rate of payment for the one and for the other: and therefore we cannot collect the intention of the parties to have been to make the delivery of a *complete* cargo a condition precedent to the payment of freight for any part which was delivered. The rule was laid down in *Boone v. Eyre*, and approved by this Court in *Campbell v. Jones*, and by the Court of Common Pleas in *The Duke of St. Albans v. Shore*, that where a covenant goes to the whole of the consideration on both sides, there it is a condition precedent; but where it does not go to the whole, but only to a part, there each party must resort to his separate remedy for the breach of the contract by the other. Here it is clear that the delivery of a complete cargo does not go to the whole consideration of the freight; because the failure of bringing home one ton less than the full quantity of 400 tons would prevent the plaintiff from recovering for the 399 tons which he might have brought over. The loss on his part by such a construction would bear no sort of proportion to the injury suffered by the defendant. The fair construction therefore is, that the plaintiff should recover freight for what he has performed: and that the defendant should have a remedy against him for that which he has not performed, and which he ought to have done.

BAYLEY, J. There would be great injustice done by holding this to be a condition precedent; and none by a different construction; because if the defendant has sustained any injury by the non-delivery of a complete cargo, he will recover a compensation in damages commensurate to such injury. It is necessary to look to the instrument to see whether this be a condition precedent; to see what the intention of the parties was in this respect. It begins by stating that "it is this day *mutually agreed*." &c. That would have some little influence to shew that each of the parties had *mutual* stipulations to make. Not that those words would control the meaning of the subsequent words, if it clearly appeared that a condition precedent was intended by them.

(a) E. 18 Geo. 3. stated at length in *Jones v. Barkley*, Dougl. 689.

Then the captain engages that the ship shall be "tight, &c. and every way fitted for the voyage, and shall with all convenient speed sail and proceed to *St. Petersburg*." Now if those were to be deemed conditions precedent, then if there were any defect in the fitting out, or an hour's delay in the sailing, the remedy for the freight would be defeated. Could that have been intended by the parties? Then the ship is to return with a *complete* cargo: and if that were a condition precedent, then if there were a deficiency of one ton only in the cargo, though all the rest were delivered, the defendant would have all the benefit of such delivery without being obliged to pay any thing for it. Is that reasonable? and can we collect any such intention from the instrument? In *Cooke v. Jennings* the freight was to be paid for deals *delivered at Liverpool*: none were delivered at *Liverpool*; and therefore no freight could be due. In *Bright v. Couper* an *entire sum* was to be paid; and therefore unless the plaintiff was entitled to recover the whole, he could not recover any part. Unless therefore there was a performance of the whole for which that entire sum was to be paid, which there was not; he could recover nothing(1). But there is nothing here to shew that it was the intention of the parties, that the delivery of a *complete* cargo should be a condition precedent to the recovery of any freight actually earned. Great injustice would ensue from holding it to be so: and no injustice to either party from holding it not to be so(2).

Postea to the Plaintiff.

Lady Wilson v. Wigg and Another, Executors of Anderson.

10 East, 313. Nov. 15, 1808.

To a count in covenant, charging the defendants as executors for breaches of covenant by their testator, as lessee, who had covenanted for himself, his executors and assigns, may be joined another count charging them, that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one *D. A.* against whom breaches were alleged; and concluded that so neither the testator, nor the defendants, after his death, nor *D. A.* since the assignment to him had kept the said covenant, but had broken the same. And *plene administraverunt* may be pleaded to both counts.

THE plaintiff declared in covenant upon a lease granted by her and her husband, deceased, to the defendant's testator of certain lands and tithes for 21 years from *Michaelmas* 1787, at a certain rent; whereby the testator covenanted for himself, *his executors, administrators and assigns*, to perform the covenants in the lease. And by the first count, after stating the above, and that the testator had entered and was possessed of the premises, and made his will, appointing the defendants executors, and died, and that the defendants had proved his will, the plaintiff alleged breaches of covenant by the testator in his life-time. And by the second count she charged, that after the testator's death, and after the defendants had proved his will, &c. and during the term, all the estate, right, title, interest, and term in the demised premises *came to one D. Anderson by assignment thereof*, by virtue of which he entered and was possessed; and then the plaintiff charged, that the said *D. Anderson* since *the assignment made to him as aforesaid*, and his said entry and possession, &c. had not kept the covenant in the said lease, (specifying the breaches in the usual way by such assignee of the term:) concluding, and so the plaintiff saith, that neither the said testator in his lifetime, nor the defendants after his

(1) Vide 3 Balstr. 325 per Crew Ch. J. *Waddington v. Oliver*, 2 New Rep. 60. *Faxon v. Mansfield & al.* 2 Mass. Rep. 147.

(2) Vide *Davidson v. Gwynne*, 12 East 381. *Beaumont v. Pisle's exrs.* 7 Johns. 249, in which the principle of the decision is fully recognized.

death, nor the said *D. Anderson* since the assignment made to him as aforesaid, have kept the said covenant, but have broken the same, &c.

The defendants pleaded, 1st, performances of the covenant by the testator in his lifetime; and 2dly, *plene administraverunt* as to the same breaches: and demurred specially to the breaches assigned in the second count to have been committed by *D. Anderson* the assignee of the term, because he was no party to the action; and because the plaintiff could not count in the same declaration against the defendants as *executors* for breaches of covenant committed by the testator in his lifetime, and for other breaches of covenant by the defendants themselves, or by the said *D. A.* as *assignee* of the lease; and that these different breaches of covenant could not be joined in the same declaration; and that the defendants, as *executors*, were not by law answerable for the acts of *D. A.* as alleged against them for breaches of covenant assigned against the said *D. A.* &c. On which there was joinder in demurrer.

Manley, Serjt. in support of the demurrer, being asked by the Court what objection there could be to this mode of declaring against *executors*, answered, that the two counts could not properly be joined, because in the first they were sued as *executors* for breaches of covenant by their testator; and in the second they were sued in effect as *assignees* of the term after their assignment to *D. Anderson* for breaches committed by him; and it might be very doubtful whether *plene administraverunt* could be pleaded to the second count.

Lord ELLENBOROUGH, C. J. The testator covenants for himself, his *executors* and *assigns*: then are not his funds liable to the plaintiff for any breaches committed by himself, or his *executors*, or his *assigns*? *D. Anderson* is an *assignee* of the testator, and his *executors* are liable in that character for breaches committed by him: and therefore no doubt that *plene administraverunt* may be pleaded to the last count as well as to the first. That was settled in the case of *Lyddall and others v. Dunlopp and others, Executors of Fenton*, 1 Wils. 4.

Manley, Serjt. then prayed leave to amend; which was granted conditionally.

Holroyd was to have supported the declaration.

Wells v. Fydell and Elizabeth Betts.

10 East, 215. Nov. 15, 1808.

It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead *plene administravit* of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading *plene administravit* by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund out of which any *debt* by the first executor could be made good.

THE plaintiff sued the defendants as executor and executrix of *John Betts*, deceased, which *John Betts* was surviving executor of *John Parish*, deceased, in covenant, upon an indenture of demise dated 19th March, 1774, whereby *John Parish* demised to one *L. Pape* certain land and buildings for 70 years from the 6th of April then next, at a certain rent, and on certain covenants: and declared, that by another indenture of the 10th of June 1774, *Pape* assigned the residue of the term to the plaintiff. That *Parish* afterwards died during the term, having first duly made and published his will, and thereby appointed the said *John Betts* and one *F. Flowers* executors thereof, who duly proved the same. That *Flowers* afterwards died, while the plaintiff was so possessed of the term; whereby *John Betts* became surviving executor of *Parish*: and that *John Betts* afterwards, on the 11th of October 1803, died, having first made his will, whereby he appointed the defendants his executor and executrix, who duly proved his will, &c. The declaration then stated a breach of the covenant for quiet enjoyment by *John Parish* in his life-time,

and since his decease by the defendants as such executor and executrix as aforesaid, in consequence of an eviction of the plaintiff from a certain part of the demised premises by the mayor and burgesses of *Boston* having lawful title thereto.

The defendants pleaded, *inter alia*, that they have fully administered all and singular the goods and chattels which were of the said *John Parish*, deceased, at the time of his death, and which have ever come to the hands of the defendants as executor and executrix as aforesaid to be administered, to wit, at, &c.; and that they, the defendants, have not, nor on the day of exhibiting the bill of the plaintiff in this behalf, or at any time since, had any goods or chattels which were of the said *John Parish*, deceased, at the time of his death, in the hands of them, the defendants, as executor and executrix as aforesaid, to be administered; and this the defendants, executor and executrix as aforesaid, are ready to verify; wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action thereof against them, &c. To this plea there was a general demurrer and joinder.

Williams, Serjt. objected to the sufficiency of the plea, which only put in issue the due administration by these defendants of the assets of the original testator *Parish*, which had come to their hands, as such assets; but did not also allege, as it ought to have done, that their immediate testator, *John Betts*, had fully administered in his own time the assets of his testator *Parish* which had come to his hands; or at least that the defendants had fully administered to *J. B.* their own testator. The frame of the plea would then have been, that the defendants testator *J. B.* had fully administered all the goods and chattels of his testator *J. Parish* which had come to his hands in his lifetime; and that the defendants had fully administered all the goods and chattels of *J. Parish* which had come to their hands as executor and executrix of *J. B.* since his decease, &c.—or that they had no assets of their testator *J. B.* in their hands to be administered. For it might have happened that the original testator *Parish* had large funds which had been converted into money by his executor *J. Betts*, which he had not administered, and when mixed with his own property could not be distinguished; and such mixed property might have come to the hands of the defendants, his personal representatives, apparently as his own property. But if the plaintiff had taken issue on the plea as it now stands, it would not have been sufficient for him to have shewn that *J. Betts* had assets of *Parish*, and that the defendants had assets of *J. Betts*; unless he could also have shewn that the defendants had assets of *Parish*; which in the case suggested of a mixed fund, it would have been impossible to have distinguished. Before the statutes 30 Car. 2. c. 7. and 4 & 5 W. & M. c. 24. s. 12. if an executor had wasted the goods of his testator, and died, no action would have lain against his personal representative; because the action arising *ex maleficio*, it died with the person. But since those statutes giving the remedy over, that answer cannot be given to the present objection. The plaintiff does not indeed charge a *devastavit* by *J. Betts*: nor was it necessary: for if he had, the defendants might still have covered themselves by pleading *plene administraverunt* to him: according to the true record of *Skelton v. Hawling*(a). The only authority which seems to support this plea is the conclusion of the report of *Williams v. Keinschame*, Dy. 174. b. 175. a; where, upon a repleader awarded, the defendant, who was sued as the executor of an executor on a bond made by the first testator, is stated to have pleaded *de novo*, "that he, after the death of both testators, had fully administered all the goods and chattels which were of the first testator at the time of his death, and that he had no goods or chattels which were of the first testator at the time of his death in his hands to be administered on the suing out of the

(a) 1 Wils. 258. explained and corrected by the record, as it appears in the note to *Wheatley v. Lane*, 1 Sound. 219. d.

writ or afterwards." But upon consideration of the whole case, it should seem that that was pleaded in addition to the former plea that *the defendant's testator in his lifetime fully administered* all the goods and chattels which were of the first testator at the time of his death, &c. : for the repleader was awarded to correct the error in the subsequent part of the first plea, where he had stated that *he (the defendant)* had no goods or chattels which were of the first testator at the time of his death in his hands to be administered, &c. ; when it should have been that *his (the defendant's) testator*; (the first executor) had fully administered to his testator, and he the defendant, to his testator. And this is confirmed by the form of pleading in a subsequent case of *Woodward v. Chichester*, executor, &c. in the same book, Dy. 186. b ; where, to a similar action against the executor of an executor, he did not plead *plene administravit* generally, but that his testator, the first executor, had duly administered : though he omitted to plead further that he also had duly administered : for, as was there observed, the answer was not full and perfect. Still it shews, comparing the two cases together, so near in time to each other, what was necessary to constitute a full and perfect answer by an executor of an executor sued for a debt of the original testator.

Abbott, contra. The estate of the first testator is the only one which is bound in law for the satisfaction of the plaintiff's debt ; and therefore if the defendants have never had any part of that estate out of which the debt was to be satisfied, and in respect of which they are charged, that is at least a *prima facie* answer to the demand. The wasting of the original testator's assets by the first executor, being a criminal act and offence, is not to be presumed ; but if he have been guilty of it, the plaintiff should have brought forward the charge specifically by alleging a *devastavit* in his declaration, as was done in *Skellon v. Hawling*, 1 Wils. 268 : in order that the defendants might be prepared to refute the charge. If there were any goods of the first testator liable for this debt, they must have come into the hands of the defendants, unless wasted or administered. The plaintiff does not charge that any goods were wasted by the first executor ; such as came to his hands must therefore be taken in the first instance to have been duly administered. Then the plea of *plene administraverunt*, covering all the acts of the second executors, is *prima facie* a good answer to the declaration. And no greater difficulty is thereby put on the plaintiff than if the defendants had pleaded a full administration both by the first executor and by themselves ; for the plaintiff could only have taken issue on one of those facts : and if they meant to rely on a wasting by the first executor, it would have been still open to them to reply it. If the latter part of the report of *Williams v. Keinshame* in Dyer, 174 b. 175 a., correctly state the whole of the plea, as it purports to do, that is an authority in point for this form of pleading. The first plea there stated was certainly imperfect, probably from mere mistake ; and a repleader was awarded. Then if the new plea stated had been in addition to the first, it is probable that the reporter would have said so. And there is this reason also for supposing it was not, that the plea would otherwise be tautologous : for the defendant had in first instance pleaded that he had no goods or chattels in his hands of the first testator at the time of his death to be administered : and the same allegation is contained in the new plea (a). [*Bayley, J.* If the plea here had been, that the first executor had fully administered, &c. and that since his death his executors had no goods and chattels in their hands of the original testator : would it have been pleading double to have replied that the first executor had not fully administered, nor the defendants since his death, &c. ? *Le Blanc, J.* Both those facts suggested as proper to have been stated in the plea are necessary to be substantiated in order to give a complete answer to the plaintiff's demand. *Bayley, J.* If the replication could not put in issue the whole plea as suggested ; then, if the first

(a) It was asked by the Court whether the roll had been searched : but it had not : and as no opinion appeared to have been given on the new plea, it was not thought necessary.

executor had received 100*l.* assets, and had duly applied 50*l.*, and wasted the other 50*l.*; and if the second executor had received 50*l.* assets of the first executor, and had wasted as much; then if the plea now pleaded be good, and the plaintiff, having better proof of the wasting by the first executor than by the second, were driven to reply the wasting by the first, then the defendant would cover his own wasting.] If the plaintiff could take issue on both facts, there is no reason why he should not reply the one which was omitted in the plea, and still rely on both. He then referred to the precedent of such a plea, as this pleaded, 4thly, in *Lockyer v. Coward and another*, executors of an executrix, 3 Wils. 55, which did not pass without observation, though this point did not arise, but another point upon the replication to that plea.

Williams, Serjt., in reply, doubted whether the plaintiff could charge a *devastavit* by the first executor in his replication to this plea: but contended that, at any rate, he ought not to be driven to rely on it, as he might not know at the time that the goods had been wasted. But the defendants ought to plead such a plea as will cover all the assets of the original testator, as well those which came to the first executor's hands, as those come to their own: and then as both the facts make only one defence, the replication may well put the whole in issue. As in *Hancocke v. Prowd, Administrator*, 1 Saund. 336 b., where several judgments recovered were pleaded to cover the whole assets; a replication answering each particular judgment, and concluding the answer to each with a *paratus verificare*, was held to be rightly pleaded, and not double,

Lord ELLENBOROUGH, C. J. In the absence of any precise precedent of the proper form of a plea of *plene administravit* by the executor of an executor, we must be guided by the rule of reason and common sense. The question is, whether this plea give a fair *prima facie* answer to the declaration: for where an executor is charged for a debt of his testator, it is incumbent upon him to give an answer denying having any funds, or a sufficiency of funds to answer the debt, otherwise it shall be presumed that he has funds in his hands applicable to the purpose. This is the case of executors of an executor; and if the first executor received assets and did not duly apply them, he would be liable *de bonis propriis*; and if the second executors received assets of the first testator, or of such second testator, and did not duly apply them, then they would be personally liable. Now by this form of plea the defendants purge themselves of any wasting of the goods of the first testator come to their own hands; but as to the administration of the assets by their own testator, they say nothing. How then are we to collect whether the first executor well applied the assets of his testator, without any thing said in that respect by the second executors? The plea being silent as to this, if issue were taken upon it, would it not be sufficient for the defendants to prove that they had well applied whatever assets had come to their hands of the first testator; though there might have been funds sufficient come to the hands of the first executor which he had misapplied: and though enough had in fact come to the hands of the second executors of the proper funds of the first executor which would be liable to make good such wasting by him. Then the defendants have by this plea only given an answer to one part of a case which points at two kinds of misapplication of those funds which were liable to the plaintiff's demand: it is therefore an imperfect answer.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. This plea does not cover the whole of the declaration. The plaintiff has a claim on *Parish*, for which the defendants are liable if any funds of *Parish* have come to their hands which have not been duly administered, or if their testator *Betts* received and misapplied any of the funds of his testator *Parish*, and the defendants have sufficient assets of *Betts* in their hands. The plaintiff is not cognizant of the affairs either of the first testator, *Parish*, or of the second testator, *Betts*; but he sues the personal representatives of both. The defendants may discharge themselves in two ways; ei-

ther by shewing that the first executor fully administered all the goods and chattels of *Parish* which came to his hands, and that the defendants since the death of the first executor have duly administered all that they have received of *Parish's* assets: or they may shew that they have received no assets of the first executor. But as the plea now stands they leave unanswered every thing respecting the assets of the first testator which came to the hand of his executor, and merely answer as to their own application. And in the absence of precedents on which reliance can be had, in respect to the form of such a plea, we must look to the reason of the thing; which requires a full answer to be given in the first instance by those who must be taken to be cognizant of the facts; for otherwise there must be a rejoinder and replication upon matter which ought to have been originally stated by the defendants; and that will be throwing a burthen upon a plaintiff to reply a fact of which he cannot be supposed to be cognizant at the time.

BAYLEY, J. The plaintiff is entitled to recover his debt in either of two events: if the defendants have received assets of the original testator, and have not properly applied them: or if the defendants have received assets of the first executor, and the first executor had received assets of his testator, and had not duly applied them. The defendants have only answered as to one of those events; but the plaintiff may be entitled to satisfaction out of both funds; and therefore he is entitled to have the issue so framed that if any thing be forth coming to him out of either fund, he may be able to avail himself of it. But if we were to hold the present plea to be good, it would work injustice: for the plaintiff would fail, if he could only shew on the trial that the first executor had received assets, and converted them to his own use: and if the plaintiff were driven to reply that the first executor had received and misapplied the assets of his testator, and issue were taken on that fact only, it would exclude the plaintiff from recovering assets of the original testator which had come to the defendants and been misapplied by them: and the inconvenience in the case which I before put in the course of the argument would ensue from this mode of pleading. But the plaintiff is entitled to have the issue so framed as to include both the events on which the defendants' liability arises.

Judgment for the Plaintiff.

The King v. The Inhabitants of Rushulme.

10 East, 325. Nov. 19, 1806.

No settlement can be gained by serving under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends: for that is to be taken distributively, i. e. reserving a week out of each year.

DANIEL COTTERELL, his wife, and children, were removed by an order of two justices from *Disley* in *Cheshire*, to *Rushulme* in *Lancashire*, which order was confirmed by the Sessions, on appeal, upon these facts, which were stated specially for the opinion of this Court. The pauper, *D. Cotterell*, was hired to *John Tonge*, in the township of *Rushulme*, for four years, with liberty to leave a week every year to see his friends, and he served the four years accordingly.

Topping and *J. Williams*, in support of the orders. The hiring here was entire for four years an end, and not four successive hirings for so many successive years; and the only question is, whether the exception, if it be such, will make it a contract for less than a year? No argument can elucidate the case beyond the statement of the question: and accordingly as that is answered in the opinion of the Court, the legal consequence is clear: if it be an exception in the contract, so as to make it at all events a contract for less than a year, no settlement can be gained; if only a dispensation, it may. And with re-

spect to the latter, they observed, that this was only a *liberty to go and see friends* for a week in every year. The pauper was not at liberty to hire himself to any other person; as in *Rex v. Bishops' Hatfield*, Burr. S. C. 439, to let himself for the harvest month; and in *Rex v. Empington*, lb. 791, to hire himself during the sheep-shearing season. *Le Blanc*, J. referred to *Rex v. Over*, 1 East, 599, where a pensioner of the *East-India* Company hiring himself for a year, with a reservation of two days in each half year for him to go and receive his pension, was held not to gain a settlement by service under such a contract.]

Scarlett, contra, shortly referred to *Macclesfield v. Sutton*, Burr. S. C. 458, *Rex v. Kingswinford*, 4 Term Rep. 219, and *Rex v. North Nibley*, 5 Term Rep. 21, as in point; where the stipulation in each contract was to work only certain hours in the day, under which no settlement could be gained: and this was in effect to serve only 51 weeks in each year.

Lord ELLENBOROUGH, C. J. Here is a hiring for a period of four years, with an exception of a week in every year: that is to be taken distributively, a week out of each year. Therefore the master had no dominion over the servant for any one entire year, but only for one year minus one week in that year, and so on.

Orders Quashed.

Shombeck v. De La Cour.

10 East, 326. Nov. 21, 1808.

A plea of tender to one count, and to a plea of alien enemy to another, cannot be pleaded together.

THE defendant had leave to plead several matters; as to all the matters, in the declaration, except 7l. 17s. 6d., parcel, &c. of the third count, that he did not promise; and a tender of that sum; which the plaintiff refused to accept: and for further plea, as to all but the 3d count, that the plaintiff is an alien enemy. Whereupon *Holroyd* obtained a rule for the defendant to shew cause why so much of the rule to plead double as applies to the two last pleas should not be discharged, and why those two pleas should not be struck out, upon the ground of their inconsistency. This was now opposed by *Richardson*, who observed that there was no occasion for the rule to plead double as to these two pleas, as they went to different counts; and therefore the case must be taken to be the same as if the defendant had in the common way pleaded a tender as to one count, and a plea of alien enemy as to another. That the plea of alien enemy had been permitted by the practice of this Court, though not in *C. B.*(a), to be pleaded with other pleas; and that there was the less reason for the objection, as alien enemy might be given in evidence under the general issue.

The Court, however, approved of the practice of *C. B.* Lord *Ellenborough*, C. J. observed on the manifest repugnancy of these pleas: the plea of tender admitting that the plaintiff had a locus standi in court as to part of the demand; and the plea of alien enemy denying that he had any right to stand in a *British* court of justice, or to recover any thing(1).

Rule absolute.

(a) In *Thyatt v. Young*, 2 Bos. & Pull. 72. the Court of *C. B.* refused to allow *non assumpsit* and *alien enemy* to be pleaded together.

(1) Vide *Truckenbrodt v. Payne*, 12 East, 206, and notes.

Delanoy v. Cannon.

10 East, 328. Nov. 21, 1808.

After a writ sued out, and common bail filed, against a defendant by the name of *J.*, it is irregular for the plaintiff to declare against him by the name of *R.*, sued by the name of *J.*; and the defendant may set aside the proceedings before plea.

A WRIT was sued out against the defendant by the name of *John*, and common bail filed against him by the same name: and then the plaintiff declared against him by the name of *Robert* (his real name) sued by the name of *John*; on which *Espinasse* obtained a rule nisi to set aside the proceedings for irregularity; against which *Richardson* now shewed cause, and cited *Oakler v. Giles*, 3 East, 167. But *The Court* observed that the application to set aside the proceedings for irregularity was not made till after judgment, and when the defendant might have before pleaded in abatement; but here it is before plea. He then referred to *Summers v. Wason* in *C. B.*, 1 Bos. & Pull. 105.; where a similar objection was over-ruled in the case of bailable process. To which it was answered that the cases of *Green v. Robinson*, (a) and others to the same effect (b), had not been there mentioned; which cases shewed the proceedings here to be irregular. And the Court made the

Rule absolute(1).

Bainbridge and Another v. Neilson.

10 East, 329. Nov. 22, 1808.

A ship insured from *Jamaica* to *Liverpool* was captured in the course of her voyage, and recaptured in a few days; and the assured having received intelligence of the capture but not of the recapture, gave notice of abandonment; and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors, in a port in *Ireland*, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his possession without damage, and arrived at *Liverpool*, and earned her freight; the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent.: held that he was not entitled to abandon; it appearing in the result that at the time when the notice of abandonment was given, it was in fact only a partial and not a total loss, as the assured supposed; and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c. to continue it a total loss. And *quære* whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss.

The like point was ruled on the freight policy, on which there was a partial loss of 13*l.* 11*s.* 5*d.* per cent.

But at any rate, if the underwriters accept the offer of abandonment, made upon such temporary total loss, both parties are bound by it.

THIS was an action upon a policy of assurance upon the ship *Mary*, valued at 6000*l.*, at and from *Liverpool* to any port or ports in *Jamaica*, during her stay there, and from thence to her port of discharge in *Great Britain*, &c.: and also upon another policy of insurance upon the freight of the same ship from *Jamaica* to her port of discharge in *Great Britain*, valued at 4000*l.* At the trial at *Guildhall* a verdict was found for the plaintiffs for 139*l.* 5*s.* 4*d.*, subject to the opinion of this Court on the following case.

The defendant subscribed both the policies for 200*l.* each. The plaintiffs, at the time of effecting the insurance, and also at the time of the capture after

(a) H. 23 G. 3. vide 1 Tidd's Prac. 386.

(b) Vide *Doe v. Butcher*, 3 Term Rep. 611. and *Corbett v. Bales*, ib. 660.(1) Vide *Dring v. Dickenson*, 11 East, 225. *Clark v. Baker*, 13 East, 278.

mentioned, were interested in the ship and freight. The ship sailed in due time from *Jamaica* with a cargo and freight bound to *Liverpool*; and on the 21st of *September* 1907, was captured on her voyage home by an enemy; and on the 25th, was re-captured. On the 30th of *September*, the plaintiffs received intelligence at *Liverpool* of the capture, but not of the re-capture; and on the day following, communicated the same to the underwriters, and gave notice of abandonment. On the 2d of *October* the intelligence of the capture was confirmed; and on the 6th of *October*, being five days after the notice of abandonment, the plaintiffs received the first intelligence of the re-capture of the vessel, and that she then lay at *Lock Swilley* in *Ireland*, in safety, in the possession of the recaptors. This intelligence was immediately communicated to the underwriters, with notice that the plaintiffs nevertheless persevered in their abandonment, but offered to do their best for the benefit of those who should be ultimately concerned and interested in the vessel, without prejudice. Under such offer, and by agreement with the underwriters, without prejudice to either party, the plaintiffs compromised with the recaptors; and the vessel has been restored, and has arrived at *Liverpool*, being her port of discharge, according to the terms of the policy, where she now is in safety. And the owners have also, without prejudice, received the freight of the goods on board her, and the proportion of salvage and expences on such goods. The plaintiffs obtained possession of the vessel at *Lock Swilley* under the said agreement after notice of abandonment, but before the action was brought; and the vessel did not arrive at *Liverpool* until after the commencement of the action. The ship was never taken into an enemy's port, nor did she sustain any damage whilst in possession of the enemy. The amount of the salvage damages and charges upon the ship is 15*l.* 4*s.* 8*d.*, and upon the freight 13*l.* 11*s.* 6*d.* per cent. on the sum insured. The defendant paid to the plaintiffs before the commencement of this action 57*l.* 12*s.* 2*d.* being the amount of his proportion of an average loss upon the two policies; which sum the plaintiffs accepted, without prejudice to their claim to recover a total loss under their abandonment. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover for a total loss? If they were, then the verdict was to stand: if not the verdict was to be entered for the defendant.

Scarlett, for the plaintiffs, contended that they had a right to abandon at the time when they gave notice of abandonment, and to abide by such notice, notwithstanding the subsequent recapture and safety of the vessel. What passed after the notice of the recapture cannot make any difference: but the question must be considered the same as if brought to issue immediately after the 6th of *October*, and while the ship was in the possession of the recaptors. This is different from all the former cases of capture and recapture and abandonment, because the abandonment was made while both parties were under a conviction that the vessel was totally lost to the assured by the capture; though before action brought she was known to have been recaptured and in safety. In *Goss v. Withers*, 2 Burr. 683, the ship, which was bound from *Newfoundland* to *Portugal* or *Spain*, was captured, and after remaining eight days in the hands of the enemy, was recaptured, and brought into *Milford Haven*; on which the assured gave immediate notice of abandonment: and the Court decided, that as between the assured and the insurers of the ship, the capture was a total loss, upon which the assured might abandon. Lord *Mansfield* indeed also relied on the subsequent circumstances: but considered the recapture in the nature only of a salvage; the ship having been carried out of the course of her voyage; and the disability to pursue the voyage still continuing at the time the abandonment was made. So here, after the recapture, the ship was carried into *Lock Swilley* in *Ireland*, which was out of the course of her voyage; and when the plaintiff received advice of it, the ship was out of his possession; and how soon she could be put into her former course could not be known; nor could the plaintiff tell whether it were for his interest to prose-

cute the voyage or not, when he determined to abide by his original notice of abandonment. The only other case which bears on the question is *Hamilton v. Mendez*, 2 Burr. 1198. The insurance was on a valued policy on ship from *Virginia* to *London*; and the ship was captured in the course of her voyage on 6th of *May*, and was recaptured on the 23d in her way into a *French* port, and brought into *Plymouth* on the 6th of *June*. As soon as the plaintiff who lived at *Hull* was informed of these events, he wrote to his agent in *London* on the 23d of *June* to give notice of abandonment to the underwriters; which notice was communicated on the 26th, when the underwriters refused to take to the ship, but offered to pay the salvage and other charges of the recapture. The ship was afterwards, on the 23d of *August*, brought by the owners of the cargo and the recaptors to *London*, where she delivered her cargo to the freighters, who paid the freight without prejudice. And the jury found that she received no damage from the capture; and the whole amount of the salvage was only 10*l. per cent.* That was ultimately held to be an average, and not a total loss. It is observable, however, that there was an interval of 17 days between the arrival of the ship at *Plymouth* on the 6th, and the notice of abandonment sent by the plaintiff on the 23d of *June*; and it cannot be supposed that intelligence of the event was travelling all that time from *Plymouth* to *Hull*: and if before such notice the plaintiff had ascertained that no material loss had been sustained, but that the ship might proceed on her voyage to her destined port at a salvage of only 10*l. per cent.*, it was too late for him to give notice of abandonment as for a total loss. Lord *Mansfield*, it must be admitted, in giving the judgment of the Court lays down some general positions which seem to trench upon the plaintiff's claim in this case; but he could not have meant them to apply to a case like the present; for towards the conclusion of the judgment he expects this very case; saying, "we give no opinion how it would be in case the ship or goods be restored in safety between the offer to abandon and the action brought," &c. He had just before said, "To obviate too large an inference being drawn from this determination, I desire it may be understood, that the point here determined is, that the plaintiff upon a policy can only recover an indemnity, according to the nature of his case at the time of the action brought, or, at most, at the time of his offer to abandon." If the latter be adopted as the rule, then as the offer was made upon the first intelligence of the capture, and while both parties continued in ignorance of the recapture, the plaintiff's right to abandon cannot be disputed. [Lord *Ellenborough*, C. J. When Lord *Mansfield* in the same sentence says, that "the plaintiff upon a policy can only recover an indemnity according to the nature of his case," is that to be understood of the supposed nature of his case, or of the real nature of it?] It must mean the nature of the case as it *bona fide* appears to the parties at the time. The plaintiff's claim is grounded on two propositions; 1st, That the offer to abandon having been rightly made at the time, a right of action became vested in the assured, which could not be defeated by subsequent events. 2dly, That when the ship was recaptured and carried into *Lock Swilley*, it was still the subject of abandonment. As to the first, it cannot be denied; because after intelligence of the capture received and the offer made to abandon, the plaintiff might *instantly* have brought an action against the underwriters to recover a total loss; and their refusal to pay cannot now vary his claim as it then stood. And if a case for abandonment exist at the time, and the party to abandon, no subsequent event can do away the effect of it, but the question is concluded. This is in every day's experience. [Lord *Ellenborough*, C. J. The question is, whether the right to abandon did exist at the time it was made: the supposed right of abandonment existed: but it remains to be shewn that the supposed, is the same as the real, right to abandon.] If the parties act *bona fide* on the notice they have of the fact, that is sufficient for the purpose of insurance. In the case of a distant voyage, and intelligence received of a capture, if the

assured could not abandon immediately, but must wait for final intelligence of the ship being carried into the enemy's port, much inconvenience may ensue, for want of such active endeavors to recapture and make the best of the loss as would otherwise be made. Suppose after notice of a loss and an offer to abandon, which the underwriters agree to accept, it afterwards turns out that there has been no loss; as in some of the late cases of the *Russian* embargo; yet the parties are bound. [Lord *Ellenborough*, C. J. There, both parties agree to act upon the supposed case, whatever the event may turn out to be.] 2dly, The ship was still the subject of abandonment when recaptured and carried into *Lock Swilley* in *Ireland*. In these cases the knowledge of the assured as to the true state and condition of the ship is a material circumstance. In *Hamilton v. Mendez*, it must be taken from the length of time intervening, being 17 days between the arrival of the ship at *Plymouth* and the sending notice of abandonment from *Hull*, that the assured had full knowledge of every thing. But here the plaintiff could not have had time to acquire information whether or not it were his interest to abandon, as he renewed his notice immediately upon receiving intelligence of the ship's arrival at *Lock Swilley*. Suppose after a recapture the ship is taken into a distant port out of the course of her voyage; if the assured be to wait for full intelligence of all the facts before he gives notice to abandon, the underwriters may object that the notice comes too late, when the event would be probably known. It is sufficient, however, if in fact the assured at the time of the notice given be ignorant of the circumstances from whence he can tell whether or not it is his interest to abandon. From the mere knowledge of the fact of the ship being in safety in the possession of the recaptors, at *Lock Swilley* in *Ireland*, which was out of the course of her voyage, he could not tell what damage she had received, how many of her crew remained, or how soon she might be able to prosecute her voyage to its termination. The case of *Goss v. Withers* bears strongly in point. There the owner had heard that his ship was recaptured and carried into *Milford Haven*, but in what state and condition he could not tell, and therefore he made his election to abandon; which it was held that he had a right to do. [Lord *Ellenborough*, C. J. Do you contend, that the intelligence of the recapture, and that the ship was in safety in a port in *Ireland*, gave the plaintiff a new right to abandon?] That is not necessary in this case, where there was previous notice to abandon given immediately after intelligence of the capture. But taking the whole sum of the intelligence together, it amounts to notice of a capture and recapture, and that the ship was then in the possession of the recaptors, in the port of another country, out of the course of her voyage, and with the prospect of continuing in ignorance of the actual state of things for three weeks, and with a probability of the ship continuing there for some time longer.

Holroyd, contra. All the circumstances of the case are material to be considered; and the plaintiff cannot convert that, which in its nature and in fact is only a *partial* loss, into a *total* loss, by offering to abandon. The action is brought upon two policies, both valued; one on the ship, the other on the freight: upon the two latter it is admitted that there has been no loss at all by the capture; and the loss in fact upon the ship is only 15*l.* 4*s.* 8*d.* per cent. Where the assured and the underwriters do not agree upon the abandonment, the right of either party can only depend upon the actual state of things at the time when the notice is given; and when the notice was given the loss had ceased to be total, and was in fact only a partial loss; though this was not known till afterwards. Nor does it follow that because intelligence was received of a capture, an action would have lain immediately against the underwriters upon notice to abandon; for it would be incumbent on the assured to make out the fact of a total loss, which could not be known with certainty till a reasonable time had elapsed to learn the final issue; and the

material fact to be proved is, that there was a total loss *at the time of the offer to abandon*. The intelligence might have come away immediately after the ship struck to the enemy, and when other vessels were in sight, so as to render the final issue very uncertain. And even after an actual capture and possession by the enemy, there is the chance of a recapture within a reasonable time, of which the underwriter is entitled to avail himself at any time at least before the action brought. If it were otherwise, a door would be opened to fraud, in the case of valued policies, which are generally valued highly, and hold out a strong temptation to the assured not to make those exertions to avoid or redeem a total loss which would, under other circumstances, be made. In *Hamilton v. Mendez*, 2 Burr. 1209, Lord Mansfield enumerates the circumstances which continue the loss total notwithstanding a recapture: "If the voyage be absolutely lost, or not worth pursuing: if the salvage be very high: if further expence be necessary: if the insurer will not engage in all events to bear that expence, though it should exceed the value, or fail of success," &c. He also refers to the instances in *Le Guidon* of a total loss where the assured may abandon: "If the damage exceed half the value of the thing; or if the voyage be lost, or so disturbed that the pursuit of it is not worth the freight." Now, none of those circumstances exist in the present case: the voyage was not lost, though the ship was carried by the recaptors into a port a little out of her course, where she was known to be in safety; and in fact she did afterwards perform her voyage, and earned all her freight, and the salvage is very low. Lord Mansfield further says, that "the action must be founded on the nature of the plaintiff's damnification, as it really is *at the time of the action brought*;" for that "it is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification in truth is an *average*, or perhaps no loss at all." The plaintiff might not know that the loss was only partial when he offered to abandon; but the master on board knew the fact: and where the master is a part owner, as it frequently happens, a different rule must be laid down: for the ignorance of his partner, or of his agent on shore, who procures the assurance to be made, certainly cannot entitle him to abandon upon a supposed fact, the contrary of which was known to him at the time the offer to abandon was made: which shews how dangerous and difficult a rule it would be to proceed upon the supposition of any of the parties, and not upon the fact. It may be admitted that if both parties agree to treat the case as a total loss, and the underwriter pay his money, it will bind both: as in *Da Costa v. Firth*, 4 Burr. 1966. And there is a mutual consideration to sustain such an agreement, though it should turn out to have been made upon false intelligence; for the assured ceases to labour for the ship, and the underwriter takes that labour upon himself, upon the chance of matters turning out more favourably for him. The case of *Goss v. Withers*, 2 Burr. 683, is very distinguishable from this; for the ship there was so much disabled by a storm previous to her capture as to be incapable of proceeding on her destined voyage without going into port to refit: and part of the cargo having been thrown overboard during the storm, and the rest spoiled while she lay in *Milford Haven*, and before she could be refitted, the voyage was entirely lost at the time of the offer to abandon. Lord Mansfield says, that the loss continued total as to the destruction of the voyage: and a recovery of any thing could only be had upon payment of more than half the value. With respect to the policy on freight, the whole of which had been earned, he referred to *McCarthy v. Abel*, 5 East, 388, as in point to shew that nothing could be recovered; the whole freight having been earned, and consequently no loss within the policy. That case was stronger than this, because the offer to abandon was made during the continuance of the *Russian* embargo, which was afterwards taken off; and being a chartered ship, the freight could not be due to the underwriters to whom the ship was abandoned and assigned, because it grew upon a contract

which was personal, and the new ship owners were not obliged to bring home the cargo. But as the loss was not total at the time of the action brought, and the underwriters had not done any thing to fix it on themselves, the plaintiff *McCarthy* could not recover. At any rate, the present plaintiff cannot be entitled beyond the amount of the partial loss paid to him before the action brought.

Scarlett, in reply, maintained that the action would have lain against the defendant to recover a total loss at the time of the original abandonment; for on the proof of the first intelligence, it would be taken that the capture continued; and it would lie on the underwriter to prove the recapture, and that the ship was restored to the owner, and was again prosecuting the voyage insured. The case of a captain part owner might make a distinction; but that is not the present case; and here there is no fraud imputable to the plaintiff. In *McCarthy v. Abel* the court went on the ground that the loss, if any to the plaintiff, (for in fact there was no loss of the thing insured, which was freight,) arose from his own act, and not from any peril insured against. If there had been no abandonment, or if the same underwriters had insured both ship and freight, no question could have arisen. But here there has in fact been a loss, and that by a peril insured against; and the only question is, whether it shall be deemed a total or only a partial loss; there having at one time been a total loss, and the offer to abandon having been made *bona fide* while the plaintiff had reason to believe that the loss continued total.

LORD ELLENBOROUGH, C. J. This is a case, which, though new in specie, is by no means new in principle. And though Lord Mansfield said, in *Hamilton v. Mendez*, that he would not give an opinion how the case would be if the ship were restored in safety between the offer to abandon and the action brought, yet there can be no doubt from the whole of his reasoning on that case what his decision would have been under these circumstances. The facts here are, that the ship was captured on the 21st of *September*, and recaptured on the 25th; after which, the plaintiff having received intelligence on the 30th of the capture, but not of the recapture, gave notice of abandonment on the 31st; which he persevered in after the 6th of *October*, when news of the recapture arrived, and that the ship was safe in a port of *Ireland*: but which notice the underwriters did not accept. And now it appears, that instead of a total loss, there has been a small partial loss of 13*l.* and a fraction, for salvage and charges on the policy on freight, and 16*l.* and a fraction on the ship policy, and that no damage whatever was sustained by the ship while in the possession of the enemy. And the question is, whether that which in the result turns out to be only a partial loss to a trifling extent shall, because of the notice of abandonment given when a total loss appeared to exist, be now recovered as a total loss? To give effect to such an attempt would grievously enlarge the responsibility of underwriters: it would be to make them answerable, not for the actual loss sustained by the assured whom they have undertaken to indemnify against the risks stated in the policy, but for a supposed total loss, which had in fact ceased to exist. It has been said in argument, that the offer to abandon having been rightly made at the time, a right of action vested in the assured, which could not be defeated by the subsequent events. But that proposition is not only not true in the whole, but it is not true in its parts. The effect of an offer to abandon is truly this, that if the offer appear to have been properly made upon certain supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment: but it is not enough that it was properly made, upon facts which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment. It may be said to be properly made upon notice received, and *bona fide* credited, by an assured, of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turned out to be a forgery, and

yet clearly no right of action would vest in him founded upon an abandonment made upon false intelligence, and without any thing in fact to warrant the giving of such notice. What is an abandonment more than this, that the assured having had notice of circumstances, which, if true, entitled him to treat the adventure as a total loss, he, in contemplation of those circumstances, casts a desperate risk on the underwriter, who is to save himself as well as he can. But does not all this presume the existence of those facts on which the right accrues to him to call upon the underwriter for an indemnity: and if they be all imaginary, or founded in misconception, or if at the time it had ceased to be a total loss, and there be no damage to the assured, or at least if the only damnification arise out of the very act, (the recapture,) which saves the thing insured from sustaining a total loss; the whole foundation of the abandonment fails. It is then said, that if the right of abandonment once vested and be exercised in time, it cannot be divested by subsequent intelligence of other circumstances or different events. But the case of *McCarthy v. Abel* shews the contrary; for there, though the notice of abandonment were well made at the time, it was not only divested by subsequent circumstances, but by circumstances which happened after the notice of abandonment had been given. Next, it is contended, that by the recaptors taking the ship into a port in *Ireland* the right of abandonment was revived, or a new right created; for I do not exactly understand whether this be insisted on as an entire and distinct cause of abandonment, or as connected with the antecedent capture and recapture. Now, if it grew out of the recapture, let us hear what Lord Mansfield said upon that subject in *Hamilton v. Mendez*. It does not, he says, cease to be a total loss because of the recapture, "if the voyage is absolutely lost, or not worth pursuing;" [here the voyage was not lost, and was worth pursuing, and was pursued with effect:] "If the salvage is very high:" [here it is very trifling:] "if further expence is necessary; if the insurer will not engage in all events to bear that expence," &c. But here the further expences were little or nothing beyond the salvage, and all the loss has been actually paid into the plaintiff's hands. If after the recapture the ship had been carried into a port abroad, and a sale had become inevitable, because nobody would secure to the recaptors their 1-8th, it might have been deemed to be a total loss: but that is not the present case. What was said by Lord Mansfield, however, is sufficient to shew that in the case of a capture and recapture, it does not necessarily follow that the assured is entitled to abandon as for a total loss; but it depends upon circumstances; and none of the circumstances enumerated by him exist in the present case. I cannot however consider as at present advised, that the right of abandonment relates only to the actual state of things at the time of the offer to abandon made. If it were necessary to the decision of this case, I should wish to have that point well considered. I am not disposed to enlarge the grounds of abandonment against underwriters, a privilege which, every body knows, has been much abused. In almost every case of a valued policy it is the interest of the assured to abandon; and therefore it behoves the Court to watch every such case, and in no instance to enlarge that which in the nature of the thing is only a partial, into a total, loss. It might as well have been said in *McCarthy v. Abel* that having been once a total loss, it must continue so: but the Court held otherwise; and that case is not distinguishable in this respect, except that there eventually was no loss of the subject-matter of the insurance, and here there is only a partial loss: but I can see no difference whether that which for a time was a total loss ceased altogether by subsequent events to be any loss at all, or whether it be reduced by subsequent events to so small a loss as there is in the present case. We must look, as we lately said in *Godsall v. Boldero*, 9 East, 81, to the real nature of the contract in a policy of insurance, which is nothing more than a contract of indemnity; and therefore, though there was a total loss there, as it might be called, with respect to the subject-matter of the risk insured; yet

that having afterwards intervened between the supposed damnification of the plaintiffs by the death of Mr. Pitt, and the action brought, which ademed the loss, it was held that they could not recover. So here, as that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased, and as only a small loss has been incurred in the salvage; that is the real amount of the damnification which the plaintiff is entitled to receive under this contract of indemnity, and that has already been paid by the underwriters.

GROSE, J. This is a case upon which it is said, that Lord Mansfield in *Hamilton v. Mendez* professed to give no opinion; but it is very clear what his opinion would have been upon the principles laid down by him in the same case; and if there be no express decision on the point, we must resort to principle in deciding it. And one of the best principles upon this subject is, that no artificial reasoning shall turn that into a total loss, which in fact is only a partial loss. A policy of insurance is only a promise by the underwriter to indemnify the assured against loss by certain risks: and if so, how can the plaintiff claim a total loss, when in fact the vessel insured has performed her voyage, and he has only sustained an actual loss of 15*l.* 4*s.* 8*d.* per cent. on the ship, and 13*l.* 11*s.* 5*d.* per cent. on the freight insured. The case states that which is very material, that the plaintiff had possession of the ship again after the recapture, and before the action brought; that she sustained no damage from the capture, while she continued in the possession of the enemy; and that she has been restored and has arrived at her port of discharge; and that the freight has been received by the owners. What pretence then is there for saying that this is a total loss, where no damage has been done to the ship, and only a trifling expence incurred for the salvage and charges of the recapture? We must look here to the time of the action brought to see whether there has been a total loss of the subject-matter to the plaintiff, as he alleges; and it is clear, that at the time there was not a total but only a small partial loss.

LE BLANC, J. I agree in opinion that there must be judgment for the defendant upon this case, which, though new in circumstances, is not so new in principle. The main stress of the plaintiff's argument has been, that at the time of the notice of abandonment he had a right to abandon. But there is the fallacy of it. It does not follow that he had a right to abandon because he had a right to give notice of abandonment upon the faith of the intelligence first received. At the time of the capture he had a right to give such notice: but at the time when the notice was actually given, the ship had been recaptured and was carried into *Lock Swilley* in *Ireland*, a port of the united kingdom, in the course of her voyage home: and there is no evidence of any damage sustained either by plunder of or by mischief done to the ship, cargo, or crew, which could make it a total loss. It is impossible then to say that the want of knowledge by the assured of the true state of things shall vary the fact, and make that a total loss which is only a partial loss. None of the decided cases of total loss come up to the present; and not even the cases put by Lord Mansfield in *Hamilton v. Mendez*. The plaintiff knew of some of the circumstances, but did not know them all. The mere circumstances of capture and recapture will not make it a total loss. It may often happen that intelligence is received which will justify the giving notice of abandonment; but if circumstances so turn out, that there is no total loss, it does not follow that the assured would be entitled to insist on his notice. In *M'Carthy v. Abel* the assured was justified in giving notice of abandonment, but circumstances happened afterwards which shewed that there was no loss of the subject matter. So here, circumstances have turned out to shew that only a partial, and not a total loss, has been sustained; though the notice of abandonment were properly given at the time upon the intelligence then received. This case falls in very much with an expression used by the Chief Justice in

delivering the judgment of the Court of C. P. in a late case of *Thellusson v. Shedden*, 2 New Rep. 230, where he says, "it is true that a capture simply proved establishes a total loss; but when the plaintiff in the same breath proves a recapture, there is an end of the capture and total loss, and the plaintiff is entitled to a partial loss only." So here, though a capture were proved, yet it also appearing that there was a recapture; unless it be also shewn that, notwithstanding the recapture, it still continued a total loss, it is only a partial loss.

BAYLEY, J. The case has been so fully discussed that I can add nothing to make it more clear. A policy of insurance is only a contract of indemnity, and any thing which tends to shew that an assured can recover beyond his indemnity is against the very principle of the contract: and here it would plainly lead to fraud if the plaintiff who has in fact only sustained a partial loss to a small extent, could recover beyond what would indemnify that loss. But it is said, that upon receiving intelligence he had a right to abandon immediately. I agree, that it was prudent in him to give such notice at the time, and if things had stood in the same situation he would have been entitled to abandon: but I consider that notice as including this implied condition, that things continued to exist as the plaintiff supposed they did exist at the time when he gave the notice; and if any thing happened to make that a partial, which at one time was a total, loss, the ignorance of that fact by the assured would not make it a total loss. The case of *M'Carthy v. Abel* shews, that subsequent facts will vary the right of the party to abandon as for a total loss, when ultimately no loss is incurred within the policy. Suppose a capture, and the captors afterwards give up the ship, and she pursues her voyage as before, and the assured receiving intelligence of the capture, but not of the release, give notice to abandon; yet if the voyage be afterwards performed, would that entitle the assured to make it a total loss, when he had sustained no actual loss at all, though the voyage might have been a little delayed? Yet that would shew that circumstances happening after a total loss once existing may take away the right to abandon. Then, if the fact be, that at the time of the notice to abandon given, it was not a total, but only a partial, loss, the giving such notice could not entitle him to abandon as for a total loss. By deciding that in all these cases the right of the party to abandon shall depend upon the actual circumstances of the case, and not upon those which are merely supposed to exist at the time, no injustice will be done, and it will make the policy that which it ought to be, and really is, a contract of indemnity(1).

Postea to the Defendant.

(1) The two principal questions involved in the decision in the text, viz. Whether it is the real state of facts, or the intelligence received, which gives to the insured a right of abandonment; and, whether if there was in fact a total loss at the time of abandonment, it can be reduced to a partial loss by any subsequent events before action brought; have been the subject of considerable investigation and discussion in the American courts. The Supreme Court of New-York, in giving their opinion in *Mumford v. Church*, 1 Johns. Ca. 147, and *Slocum & al. v. The United Insurance Company*, 1 Johns. Ca. 151, say, that an abandonment once properly made, is definitive, and fixes the rights of the parties. In *Duttl v. Gatliff*, 4 Dail. 446, the Supreme Court of Pennsylvania recognized the principle, that the rights of the parties are to be determined at the time of abandonment. The same principle was recognized by the Supreme Court of the United States in *Rhineland v. The Insurance Company of Pennsylvania*, 4 Cranch. 29. 46; and has been established by repeated decisions of the Supreme Court of Massachusetts. See *v. Boardman*, 3 Mass. Rep. 288. *Munson v. The New England Marine Insurance Company*, 4 Mass. Rep. 88. 91. *Wood v. The Lincoln and Kennebec Insurance Company*, 6 Mass. Rep. 479. 482. In the case last cited Chief Justice Parsons, in delivering the opinion of the Court, said, "The right to abandon is a vested right, and when legally exercised, the assured is entitled to recover as for a total loss; which subsequent events cannot prevent, unless with his consent, manifested expressly, or by a reasonable implication from his subsequent conduct." With regard to the other question there has not been an entire uniformity of decision. In the cases of *Mumford v. Church*, 1 Johns. Ca. 147. *Slocum & al. v. The United Insurance Company*, 1 Johns. Ca. 151. *Murray & al. v. The United Insurance Company*,

French, Clerk, v. Trask.

10 East, 348. Nov. 21, 1808.

Prohibition granted on affidavit that the defendant (to a libel for tithes in kind in the spiritual court) answered on oath or pleaded a modus: without its appearing that the modus was regularly pleaded below, so as to be put in issue there.

THE plaintiff, rector of *Odcombe* in *Somersetshire*, libelled the defendant, a parishoner, in the consistorial archdeaconal court of *Wells* for tithe in kind; and *Dampier*, on a former day, moved for a prohibition upon an affidavit that the defendant had "answered on oath or pleaded in the said court to the said libel" a modus of 40s. payable at *Easter* for the farm of which he was possessed, in lieu of tithes and ecclesiastical dues in respect of the same, which he had duly tendered to the rector, who refused to accept it.

Barrow now shewed cause, and objected that the defendant had only put in an answer of a modus in the court below, but had not regularly pleaded it; and that there was a distinction recognized in the practice of the ecclesiastical courts between those two stages of proceeding; consequently this application came too soon: for before plea there could be no issue, and it could not be told till then that the ecclesiastical court was proceeding to try the modus. And he cited *Stone v. Harwood*, Rep. temp. Hardw. 357, and *Boughton v. Hulster*(a), as in point. And to a question by the Court, whether the suggestion were not verified here by affidavit; he answered that it was not. (But *Dampier* said, that the time was not out for verifying it.) He also referred to a case of *Stainbank v. Bradshaw*(b) in last *Easter* term; which at first was

2 Johns. Ca. 263, and *Livingston v. Hastie & al.* 3 Johns. Ca. 293, the property was in fact restored, or released and in safety, before the offer to abandon, and yet the Supreme Court of *New-York* held, that the assured were entitled to recover as for a total loss. The intelligence received, and not the real state of facts, was distinctly recognized as the ground of abandonment. But the cases of *Church v. Bedient & al.* 1 Caines' Ca. 21, and *Hallett v. Peyton*, 1 Caines' Ca. 28, soon afterwards came before the Court of Errors of that state, in which the point was directly met, and over-ruled. Those decisions have since been acquiesced in by the Supreme Court. *Penny & Scribner v. The New-York Insurance Company*, 3 Caines 157, 8. In *Rhineland v. The Insurance Company of Pennsylvania*, 4 Cranch 21, the restoration did not take place until after the abandonment; of course, the present question could not arise. But in *Marshall v. The Delaware Insurance Company*, 4 Cranch, 202, this was the principal point, and the Supreme Court of the *United States* there decided, that the right of the assured to abandon depended upon the state of the fact at the time and not upon the intelligence received. Chief Justice *Tilghman*, in delivering the opinion of the Supreme Court of *Pennsylvania*, in *Dutik v. Galliff*, 4 Dal. 450, avoided any decision upon the point under consideration: because in that case the property remained in the custody of the captors at the time of abandonment. But in a later case determined by the same Court, this point is considered as at rest. "It is the actual, and not the supposed state of things, at the time of abandonment, that must govern the case." *Adams v. The Delaware Insurance Company*, 3 Binn. 287, 292. The case of *Dorr v. The New-England Marine Insurance Company*, 6 Mass. Rep. 221. is an instructive case upon this subject, though it was eventually decided upon other grounds. Chief Justice *Parsons*, who delivered the opinion of the Court, evidently considers the arguments in favour of the conclusiveness of an abandonment made upon information of a loss, as entitled to much consideration.

(a) Tr. 1 Geo. 1. 1. B. R. 3. *Guillim's Tithe Cases*, 951. "Sait in the spiritual court for tithes of loppings of trees. The defendant by his answer in that court had alleged that the trees were above 20 years growth, and therefore not titheable; after which he moved in B. R. for a prohibition, suggesting the matter contained in his answer in the spiritual court, with an affidavit of the truth of it. The Court denied a prohibition; for the party should have pleaded this matter in the spiritual court, and have produced an affidavit that the court had refused to receive such plea." And 2 Ld. Ray. 885. Far. 187. and 2 Inst. 648. were cited.

(b) It was stated in that case, by the party moving for the prohibition, that there were two questions raised by the proceedings before the ecclesiastical court, which that court had no jurisdiction to try; 1st, Whether a certain part of the land in respect of which tithe of hay and agistment tithe were claimed was within the parish; and, 2dly, Whether certain other

supposed to have been like the present; and that the Court had refused a prohibition because the modus had not been put in issue by pleading it below. But *Le Blanc*, J. observed that that was after sentence: and *Bayley*, J. said, that it could not be permitted to a party to take the chance of a trial below, and when that was decided against him to come to this Court and object to such trial(a). And finally

Lord ELLENBOROUGH, C. J. said, (and the rest of the Court agreed) that there must be a prohibition in this case; for it appeared that there was nothing to try in the Court below but the modus insisted upon in the defendant's answer.

Rule absolute for a Prohibition
as to the Trial of the Modus.

Hodson and Mary his Wife v. Sharpe and Another.

10 East, 350. Nov. 22, 1808.

A lessee of land in the *Bedford Level* cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 Car. 2. c. 17. for want of being registered; such act, enacting that "no lease, &c. should be of force but from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers, registering their titles before.

THE plaintiffs declared in covenant, that one *W. Welles*, being seised in fee of the demised tenements at *Upwell* in *Norfolk*, on the 8th of *September* 1798, by indenture of that date, demised the same to the defendants for 11 years, under certain covenants to keep the premises in repair, &c. That *Welles* afterwards, on the 12th of *August* 1801, devised the reversion of the premises to the plaintiff *Mary* in fee, and died, &c.: and then alleged a breach for non-repair, &c. To which the defendants pleaded, amongst other matters, that the land intended to be demised by virtue of the said indenture, before the making thereof, was parcel of the 95,000 acres mentioned in the stat. 15 Car. 2. c. 17. for draining the *Bedford Level*, and incorporating the adventurers by the name of the governor, bailiffs, and commonalty of the company of conservators of the Great Level of the fens, and giving them a common seal. By s. 8. of which it was enacted, that all conveyances by indenture of the said 95,000 acres, or any part thereof, entered with the registrar (one of the officers named in the corporation) in a book to be kept for that purpose, should be of equal force to convey the freehold and inheritance of the same as if by indenture inrolled within 6 months of record at *Westminster*: and it was further enacted, that no lease, grant, or conveyance, &c. of the same (except leases for seven years or under, in possession) should be of force but from the time it should be entered with the said registrar as aforesaid, &c. And then the defendants averred, that the said indenture hath at no time whatever hitherto been entered with the registrar for the time being, appointed by the corporation, in manner and form as required by the said act; by reason of which the indenture is of no force. To which there was a general demurrer.

Best, in support of the demurrer, contended that the lease, though invalid

land were *lay land*, i. e. hard dry land, in opposition to natural meadow or moist land, and whether it were covered by a modus. But there was great doubt upon shewing cause whether, upon the face of the proceedings brought before the Court by the suggestion, and upon the face of the sentence, these facts had been in issue below; and finally Lord *Ellenborough*, C. J. said—This is an application *after sentence*. But it does not appear from the sentence, nor from the suggestion, that the Court below have proceeded to try the question of the boundary of the parish. And as to the question whether the land were natural meadow or not, the party applying for a prohibition should have come before sentence; for if he will lie by and suffer the fact to be tried below, it is too late to come after sentence.

(a) Vide *Offley v. Whitehall*, Bunb. 17.

till registered, as against third persons claiming adversely, was yet binding between the parties themselves, notwithstanding the words of the act, that "no lease, &c. (except leases for seven years or under in possession) should be of force but from the time it should be entered with the said registrar:" for that only means of *no force as against third persons*. [*The Court* then said they would hear what could be urged against that construction; for the general object of this and other acts of the like kind was to give notice to third persons, and thereby prevent frauds.]

Burrell, contra, relied on the positive words of the act, that no lease (such as that in question) should be of force but from the time of registering it: and referred to *Doe v. Barber*, 2 Term Rep. 749, where it was held, that the lessee of a rectory house, the lease of which had become void under the stat. 13 Eliz. c. 20, by the non-residence of the rector, could not recover in ejectment even against a stranger who had entered without title; the words of that statute being "that no lease shall endure any longer than while the lessor shall be ordinarily resident, &c.; but that every such lease, &c. immediately upon such absence shall cease and be void."

LORD ELLENBOROUGH, C. J. That was an action against a stranger to the title of the lessor, and therefore the defendant was not estopped from disputing it: but in *Cook v. Loxley* (a), which was an action for use and occupation by a rector against his tenant of the glebe lands, the defence attempted to be set up was, that the rector had been simoniacally presented, which would have avoided his title to the rectory: but the Court agreed that it was a universal rule, that a tenant should not be permitted to set up any objection to the title of his landlord under whom he held: that this was not a mere technical rule, but one founded in public convenience and policy. Here the lessee has had all the benefit which he could derive under the lease; and now he sets up an objection to it, that it is not registered; which he shall not be permitted to do. The act no doubt meant for the protection of titles that leases and conveyances within this district should be registered; that every person interested in the inquiry might know in whom the title to any such land was: and therefore as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection might prevail at law; but not as between the parties themselves to the lease, between whom the act was not meant to operate.

GROSE, J. assented.

LE BEANC, J. The defendant has enjoyed the land under the lease almost to the end of the term, and now objects that it is of no validity, because it is not registered: but the object of that clause in the act on which he relies was to take away the priority of the party whose title was not registered, with respect to subsequent claimants whose titles were registered: but it never was intended to operate between the parties themselves so as to enable a lessee who has enjoyed under it to dispute the lease.

BAYLEY, J. The object of this registry act is like that of all others, to protect the title of third persons; but not to enable the parties themselves to set it up against their own acts. Here too the defendant has enjoyed under the lease during the time in which the breaches of covenant were committed, and therefore, even if the lease were void, I should have been much disposed to have considered that he was liable on his covenant, as an independent cov-

(a) 5 Term Rep. 4. and vide *Blake v. Foster*, 8 Term Rep. 497. and vide *Graham v. Peat*, 1 East, 244, where one in possession of glebe under a lease void by the stat. 13 Eliz. c. 20., by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrongdoer. But in *Frogmorton v. Scott*, 2 East, 467, it was held that a rector, whose own lease was avoided by his non-residence, might recover in ejectment against his own lessee. The lease, however, was there held to be void on another ground, as having been made to a spiritual person against the provision of the stat. 21 H. 8. c. 13. s. 3.

enant; but it is not necessary to decide that point, as the case is clear on the other ground(1).

Judgment for the plaintiff.

The King v. The Inhabitants of Aberystwith.

10 East, 354. Nov. 23, 1808.

One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house-door with a friend, and had the garden cultivated for his own benefit as usual, is liable to be rated to the relief of the poor as occupier of the whole house.

RICE WILLIAMS was rated as a householder to the poor's rate of the parish of *Aberystwith*; and not paying the same nor shewing any cause why he should not to the magistrates before whom he was summoned, they issued a warrant of distress against him to levy 4*l.* 1*s.*, the amount of the several rates within the year; against which warrant of distress he appealed to the Sessions, on the ground principally, that he was not an inhabitant and occupier of such messuage, lands, and tenements as would make him rateable. The Sessions admitted the appeal, and ordered the warrant of distress to be quashed, subject to the opinion of this Court on the following facts.

The appellant was rated to the relief of the poor of the town of *Aberystwith*, in the county of *Cardigan*, in eight several rates from Aug. 11th 1806 to Aug. 14th, 1807, amounting in the whole to 4*l.* 1*s.*; to levy which two magistrates, upon summons, granted a warrant of distress against his goods, dated 2d of October 1807; and the distress being made, the appellant appealed against it, and the Sessions annulled the warrant of distress and the several rates; although two of them, the 7th and 8th, were made after the time of the return of the appellant and his family to his house, under the following circumstances. The appellant has kept a house in *Aberystwith* many years; and having been surgeon of the *Cardigan* militia, was occasionally absent from home, and sometimes his family; leaving one *J. Francis*, his assistant, in a part of the house. In July 1806, the appellant being previously absent, his wife and daughter left the house, having previously had the same parted off from the shop by laths nailed in the passage: so that *Francis* had only the use of the shop. The family did not return till May 1807; and during their absence a *Mrs. Hughes*, a person with whom the key of the house was left, had the garden dug up by the same person (a tenant of the appellant's) who always dug it, and who charged the appellant for his work, and looked to no other person to pay him for it. *Mrs. Hughes* always permitted two persons, *Mrs. Southern* and *Mrs. Longcroft*, one of whom was a particular friend of the appellant's, with their servants, to reside in the house six weeks or two months during the time the appellant's family were absent: and the appellant's furniture continued in its usual situation in all the rooms of the house, ready for the reception of the family, during the whole time. Coals were delivered into the house. And all parts of the house (save the shop) communicated with the garden, through which the above-mentioned persons and others entered the house. The question for the opinion of the Court was, Whether the occupation of a part of the house by *Francis* during the whole time; the occasional occupation of other parts by *Mrs. Southern* and *Mrs.*

(1) So under a law of *Pennsylvania*, which enacts, that no mortgage, &c. shall be good to pass any estate, unless it be recorded within six months, it was held a mortgage not recorded within six months was good against the mortgagor, or voluntary assignee suing in his name. *Levinz v. Will*, 1 Dal. 430.

[See also *Stroud v. Lockhart*, 4 Dal. 153.— W.]

Langcroft; the garden being cultivated as usual; and the appellant's furniture remaining in its situation in the several parts of the house ready for the reception of the family during the whole time: was an occupancy by the appellant? If the Court thought this was not an occupancy sufficient to charge the appellant with the whole of the rates: then, whether the Sessions ought not to have made an order, confirming the two last rates made after the return of the appellant and his family, and not have allowed the appeal and annulled the warrant of distress generally.

Peake and W. E. Taunton, in support of the order of Sessions, first referred to the stat. 18 Geo. 2. c. 38. s. 7., which gives the appeal against a warrant of distress for a poor's rate; and which, they observed, was the most beneficial mode for all parties of disputing the legality of the distress; for if the party rated be no occupier, he cannot suppose that his name will be on the rate, and therefore cannot be prepared to appeal against that: but the justices who grant the warrant, and the officer who distrains upon him, would be liable in trespass for an excess of jurisdiction (a). Next they argued that the appellant was not the occupier of the premises for which he was rated: but that though he were occupier of part, yet he did not occupy the whole, the warrant of distress being for an aggregate sum, for part at least of which he was not liable, would be illegal according to *Milward v. Caffin*(a). [*Le Blanc, J.* The case does not state what he is rated for, whether for the house and land, or for the land without the house; and therefore, if he be rateable at all, we cannot enter into the question of the *quantum*.] The Court must take it upon this case that he was rated for the whole; for the Sessions state the question to be whether the occupation of different parts of the house by the different persons who were suffered to have a temporary use of it, were an occupation of it by the appellant, so as to charge him with the whole of the rates. Now neither the appellant himself nor any of his servants or family had any actual occupation of the house, nor even the key of it; nor had the person with whom the key was left any authority to permit others to dwell there: and the occupation of *Francis*, who was let into possession of a part by the appellant, was confined to the shop, which was partitioned off from the rest of the house.

Lord ELLENBOROUGH, C. J. The appellant must be taken to have been the occupier of his house during the whole period. He left his home for a time; but he left part of his house in the occupation of his assistant, who carried on his business in his absence; and the key of the house was left with a friend, and the garden continued to be cultivated for his own benefit as usual; to say nothing of the occupation of his friends in his absence. There is no instance where a man has been permitted to carve out the occupation of his house in the manner now attempted; locking up one room and then another, but using as much of the house as he found convenient. This would make a new system of occupation by subdivisions. This is something like the case of *Mr. Egerton*(b), some years ago. As to the other point, upon the right of appeal against the warrant of distress, (on which the respondent's counsel had expressed a wish to have the judgment of the Court,) we give no opinion upon it, and therefore cannot prejudice the question whenever it may be necessary to decide it.

Per Curiam,

Order of Sessions quashed,
and rate confirmed.

(a) *Milward v. Caffin*, 2 Blac. Rep. 1881. That was in replevin. But where the magistrates have jurisdiction, the party rated must appeal, and cannot question the propriety of the rate in an action of trespass. *Hutchins v. Chambers*, 1 Burr. 580, and *Durant v. Boys*, 6 Term Rep. 580.

(b) *Rez v. St. Mary the Less, Durham*, 4 Term Rep. 477.

Brook and Others, Assignees, v. Trist.

10 East, 358. Nov. 24, 1808.

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiffs so much for interest money, under and by virtue of an agreement, is not sufficient.

WALTON opposed a rule on the plaintiff to accept common bail, and to deliver up the bail bond to be cancelled, because of the insufficiency of the affidavit to hold to bail. The affidavit was made by the bankrupt, that the defendant was indebted to the plaintiffs, his assignees, in 60*l.* 13*s.* 10*d.* "for interest money under and by virtue of an agreement under the hand of the defendant." And he cited *Jenkins v. Lzw*, 1 Bos. & Pull. 365, where the affidavit to hold to bail stated the defendant to be indebted "for damages awarded, and for costs and expenses taxed and allowed;" which was held sufficient, without describing the award more particularly. But

Lord ELLENBOROUGH, C. J. said this was too general, without describing more particularly the agreement. It might as well be stated that the defendant was indebted so much for damages for *the breach of an agreement*. And the Court would have made the rule absolute(1):

But *Walton* then objected that the application was out of time; and *Espinasse*, contra, not being able to account for the delay, the rule was discharged on that ground.

Bowdell v. Parsons.

10 East, 359. Nov. 24, 1808.

Where a request to the defendant to do an act is necessary to be alleged in order to give the plaintiff his cause of action; and it is alleged, but without a particular venue (there being a general venue laid in the preceding part of the declaration:) such omission cannot be taken advantage of in arrest of judgment since the stat. 4 Ann. c. 16, s. 1, being mere matter of form, available only upon special demurrer: and this, though judgment passed by default, on which a writ of inquiry was executed. And where in consideration of the purchase of hay by the plaintiff of the defendant, the latter promised to deliver to and suffer the plaintiff to take it away as he wanted it, *when requested*, an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of the residue to other persons, supersedes the necessity of alleging a request to deliver, &c. the residue.

THE first count of the declaration stated, that whereas on the 10th of *May* 1808, at *Ware* in the county of *Hertford*, in consideration that the plaintiff, at the request of the defendant, had purchased of him a stack containing twelve loads of hay, at the rate of 5*l.* 10*s.* per load, to be therefore paid by the plaintiff to the defendant, and which stack was to be taken away by the plaintiff as he might want it, the defendant undertook and promised the plaintiff that he would deliver to and suffer him to take away the same, as he might want it, *when he should be thereunto requested*. And the plaintiff averred, that though the defendant did deliver to and suffer the plaintiff to take away one load of the said hay which was then and there paid for by the plaintiff at the rate aforesaid; and although the plaintiff was ready and willing to have taken away the residue, and to have paid for the same, &c.; yet the defendant not regarding his said promise and undertaking, did not nor would deliver to or suffer the plaintiff to take away the residue of the said stack, *although he was requested by the plaintiff so to do*; but has always hitherto refused and

(1) See *Parker v. Ogden*, 1 Penn. 146.

still refuses ; and on the contrary, afterwards *sold and disposed of the residue thereof to other persons, without the consent, and against the will of the plaintiff*, and the said residue of the hay is still wholly undelivered to the plaintiff; and by means of the premises the plaintiff lost great profits, &c. and was obliged to buy other hay at an advanced price, to wit, at *Ware* aforesaid. The second count stated, that whereas on the said 10th of *May* in the year aforesaid, at *Ware*, aforesaid, in the consideration that the plaintiff, at the request of the defendant, had purchased of him a certain other stack of hay, at the rate of *5l. 10s. per load*, to be therefore paid to the defendant, the defendant undertook and promised the plaintiff to deliver to and suffer him to take the same, *when the defendant shall be thereunto afterwards requested*. And the plaintiff averred, that although the defendant did afterwards deliver to him a part, to wit, one load of the hay, which was then and there paid for by the plaintiff at the rate aforesaid, *and did request of the defendant to deliver to and suffer him to take the same* ; yet the defendant, not regarding his said promise and undertaking, did not nor would, *although duly requested*, deliver to or permit the plaintiff to take the residue, &c. but so to do wholly refused and still refuses : and by means of such refusal, &c. the plaintiff was put to great inconvenience and expense, to wit, at *Ware* aforesaid. The request by the plaintiff to the defendant to deliver the residue of the hay was laid in the same manner in other similar counts.

And after judgment by default a writ of inquiry executed, it was moved, on a former day, to arrest the judgment, because the request was not specifically alleged with a venue, as it ought to be where a request in fact is necessary to give the plaintiff his cause of action ; as it was contended to be in this case. For which was cited *Peck v. Methold*, 3 Bulstr. 297, and *Back v. Owen*, 5 Term Rep. 409.

Espinasse now shewed cause. As to the first count, it alleges a sale of the hay to the plaintiff, and that the defendant delivered one load of it, but would not suffer the plaintiff to take away the residue, *but sold and disposed of it to other persons* ; which is a sufficient breach of the contract, without alleging any specific request to deliver it, supposing the request were not formally alleged in this case. [Lord *Ellenborough*, C. J. There is clearly a sufficient breach laid in that count : for by the defendant's selling and disposing of the rest of the hay to other persons, he disqualified himself from delivering it to the plaintiff ; and therefore no request was necessary. The question then turns on the second count.] There is a specific allegation in the count, that the plaintiff did request of the defendant to deliver to and suffer him to take away the hay. But even if that were informally laid for want of a particular venue ; yet as the count states a complete contract of sale, and that the defendant, after delivery of a part, did not nor would deliver to or permit the plaintiff to take away the residue ; that is sufficient without alleging any request ; which after a sale was not necessary to be made, in order to vest the property in the plaintiff. And he referred to *Low v. Kirby*, W. Jon. 56, that where a precise request ought to be, and is alleged, but without any venue, and *non assumpsit* pleaded, which is found for the plaintiff, it is sufficient : so this is cured by the statutes of jeofails(a), being after judgment by default and inquisition.

Cowley, in support of the rule, relied on the cases before mentioned, to shew that where any thing is promised to be done, *upon request*, it is necessary in an action for a breach of the promise to allege *with a venue* a special request made : for the want of which allegation the judgment was reversed on error in *Peck v. Methold*, 3 Bulstr. 297, and in *Hayes v. Warren*, 2 Stra. 933. The

(a) The stat. 4 Ann. c. 16. s. 2, for the amendment of the law, extends to judgments by default and writs of inquiry executed thereon, which, it says, shall not be stayed or reversed for any defect which by former statutes of jeofails would have been cured by verdict. And vide the several defects in pleadings which are cured by the statutes of jeofails, 1 Saund. 228, note 1, by Mr. Serjt. *Williams*.

same objection prevailed on general demurrer in *Bach v. Owen*, 5 Term Rep. 509, which was since the st. 4 Ann. c. 16, for the amendment of the law : and both in that case, and in *Wallis v. Scott*, 1 Stra. 88, it was held that the general averment, that the defendant had not paid the money, or done the thing promised, *although requested so to do*, is not sufficient, without a special request laid. And he denied that this defect was aided by the statute of *Anne*, or any of the statutes of jeofails, being after judgment by default and a writ of inquiry executed ; the statute of *Anne* extending(a) to protect judgments by default against such objections only as are remedied after a verdict by the statutes of jeofails, and not against such as are cured by a verdict at common law. But where, as in this case, the promise depends upon the doing of something by him to whom the promise is made, the omitting to aver the doing of that thing, which would be cured by a verdict at common law, is a fatal objection after judgment by default : as was held in *Collins v. Gibbs*, 2 Burr. 899, where Lord Mansfield said, that an objection by a defendant, in arrest of judgment by default, was exactly the same as if it had arisen on demurrer. And here the omitting to give a venue to the allegation of the request is the same as if no request had been laid, according to the cases before cited.

Lord ELLENBOROUGH, C. J. It appears to me, that the second count is sufficient to sustain judgment for the plaintiff, as well as the first. The question comes now to be considered by us after the stat. 4 Ann. c. 16, for the amendment of the law ; the first section of which enacts " that in all cases where any demurrer shall be joined, &c. the Judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, &c. declaration, or other pleading, &c. except those only which the party demurring shall specially and particularly set down and express as cause of demurrer ; notwithstanding that such imperfection, omission, or defect, might theretofore have been taken for matter of substance, and not aided by the stat. 27 Eliz. c. 5. : so as sufficient matter appear in the said pleadings upon which the Court may give judgment according to the very right of the cause." Now it is admitted, according to what was said by Lord Mansfield in *Collins v. Gibbs*, that this being a motion in arrest of judgment is to be considered exactly the same as if the question had arisen on general demurrer. Then what does the statute say upon the subject : after specifying the want of several matters of form, of which no advantage or exception shall be taken, it proceeds to say, that " the Court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, or defects, or any other matter of like nature, except the same shall be specifically and particularly set down and shewn for cause of demurrer." Now is not the omission to repeat a venue (for it must be always remembered that there is one venue well laid in the declaration,) a less material omission than the want of alleging *prout patet per recordum*, where a record is pleaded ; which is one of the instances specified where the omission shall not be taken advantage of without being specially shewn as cause of demurrer : for that is an omission to refer to that by which alone the allegation is to be proved : but here the omission is of that, which is mere form. It is said, that a request must be alleged : and so it is : but then it is said, that it is not duly alleged : the imperfection however consists only in the want of a time and place, where a venue was before laid ; an omission by no means of equal importance with several of those instanced in the statute. The case of *Bach v. Owen* is relied on, as having been decided on this objection since the statute ; where Mr. Justice Buller said, " that the want of a request was a substantial defect in the declaration, and that where it was necessary to allege a special request, the general words, *though often requested*, would not answer the purpose." There was no

(a) Vide Mr. Serjt. Williams's note to *Stennel v. Hogg*, 1 Saund. 228.

judgment however in that case; but leave was given to amend: and the cases referred to in the margin of the report, if cited by him as supporting that position, are all before the statute of Anne. Another case was cited of *Wallis v. Scott*, which came on upon general demurrer subsequent to that statute: but there judgment was ultimately given for the plaintiff when the Court was full. And though one of the judges in the first instance threw out an opinion, that where a request was by law necessary, (which he thought it was not in that instance) the general averment would not be sufficient, but it must be particularly set forth, that the Court might judge whether it were sufficient: yet it is to be observed, that the healing operation of the statute of Anne was not presented to the consideration of the Court. Nor was it so in the case of *Back v. Owen*; for if it had, I think the objection there must have been overruled; because it was not only an objection of like nature, but of less force than several of those stated in the statute. In this case there is an allegation of a request, which it is admitted would be sufficient if time and place were laid with it; and I am of opinion that the want of those since the statute is not a sufficient objection in arrest of judgment.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. A request is stated in the second count; and the only question is, whether the omission of assigning time and place to that request be matter of substance or of form. There is a venue laid in the count: and as to the time and place of the request, if stated, it would not be necessary to prove them. The true principle of venues is well stated in *Ilderton v. Ilderton*, 2 H. Blac. 161, 2, in C. B.; and, according to the doctrine there laid down, the general venue would have drawn after it all transitory matters stated in the declaration. Clearly therefore, the want of alleging time and place to the request is only matter of form, and is not sufficient to arrest the judgment.

BATLEY, J. of the same opinion.

Rule discharged(1).

Paxton and Others v. Sir Home Popham and Another.

10 East, 366. Nov. 26, 1808.

After judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined.

THE declaration consisted of several counts in debt, some upon specialties, and others upon simple contracts. To the former the defendants pleaded *non est factum* and certain special pleas: to the latter, *nil debent*. The plaintiff demurred to the special pleas, and the defendants had judgment thereupon, 9 East, 408, 424. And on the pleas of *non est factum* and *nil debent* issues were joined: and the plaintiffs not having proceeded to trial on these issues, judgment, as in case of nonsuit, was moved for: which was opposed by

Burrough, on the ground that a plaintiff can only be nonsuited on the whole record; and since the statute 4 Ann. c. 16, allowing double pleading, where there has been final judgment entered for a defendant on part of the record, which can only be when the plaintiff is in court, it is incongruous afterwards to enter a judgment of nonsuit, which goes to the whole record, and assumes the plaintiff to be out of court. Now, the judgment on the demurrer is a final judgment; the defendant having judgment for his costs by stat. 8 & 9 W. 3, c. 11.; and after that the plaintiff cannot be nonsuited. Bro. tit. Nonsuit, pl. 31, (which cites 14 H. 8, 23, 24, and Co. Lit. 139, b.

(1) Vide *Higgins v. Highfield & al.* 18 East, 407. *Briggs v. Nantucket Bank*, 5 Mass. Rep. 94. *Gilbert & al. v. Nantucket Bank*, 5 Mass. Rep. 97.

Holroyd denied that there would be any incongruity, where judgment is for the defendant upon some of the pleas, and after that he is suffered to depart without day. At common law, even after a verdict for the plaintiff, if a day were given him on continuance, and he did not appear, he might be nonsuited; which was remedied by the stat. 2 H. 4, c. 7.; and so it continued after that statute upon demurrer in law joined. Co. Lit. 139, b. Here the judgment of the Court on the demurrers was an interlocutory judgment, that the special pleas were good; but the Court will not give final judgment till all the pleas are disposed of. For till the final judgment the parties have day by the roll, as it is said in *Metcalf's* case, 11 Rep. 40. And it is there said to have been held in 1 H. 7, 2, b, "that if the defendant be adjudged to account, and they are at issue before auditors, and the inquest be ready to pass, and the plaintiff make default; now shall the plaintiff be nonsuit, and shall not be received after," &c. "And this is not like other actions where the plaintiff has once judgment to recover." Now here a day was given after the judgment on the demurrers for the defendants to appear and try the issues; and they, not appearing at the day, must be nonsuited. The judgment on the demurrers to the pleas to the special counts is not that the defendants shall recover their costs; but that as to the matters in those counts the defendants shall go without day.

The Court said they would consider of it; and two days afterwards

Lord ELLENBOROUGH, C. J. delivered their opinion. The question in this case is, whether it be competent to the Court to give judgment as in case of a nonsuit in the situation in which the cause now stands? The declaration consisted of several counts in debt: some upon specialties, and others upon simple contract demands. To the specialties the defendants pleaded *non est factum*, and certain special pleas; and to the others they pleaded *nil debent*. The plaintiffs demurred to the special pleas, and upon those demurrers the defendants had judgment. Upon the *non est factum* and *nil debent* issues are joined; and the plaintiffs now contend, that as there is a judgment upon the record in favour of the defendants, a judgment of nonsuit cannot legally be entered against them. We are of opinion, however, that it may. A nonsuit is a judgment against the plaintiffs for not appearing on a day when they are demandable. These defendants have already obtained a judgment, that as to part of the demand they may go thereof without day; and if the plaintiffs do not choose to appear to prosecute the residue of their suit when called upon by the defendants for that purpose, what incongruity will it introduce upon the record to enter a judgment of nonsuit against them, or what right have they to complain of it? They have a further day given them in court to prosecute the residue of their suit; and if they do not appear when demanded at that day, how is it inconsistent with the former judgment, (of the defendants' going quit as to part without day,) to record that the plaintiffs, although solemnly demanded, came not, but made default; and to adjudge thereupon that the defendants shall go without day as to the residue also? We are therefore of opinion, that we have power to give judgment of nonsuit, and consequently that this rule should be made absolute.

O'Kelly v. Sparkes, in Error.

10 East, 369. Nov. 25, 1808.

The Prince of Wales having granted an annuity for his own life, payable by the treasurer of his privy purse, which annuity was assigned by the grantee to another; with the Prince's assent: and a surety having given bond to the assignee of the annuity, conditioned to pay it, *if the Prince, or the treasurer of his privy purse, or any other person for the Prince*, did not pay it at the respective quarter days: held that the surety was bound at all events at law by the terms of the obligation to pay it, if the Prince, &c. did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the Prince's treasurer, as required in all cases within the statute 35 Geo. 3. c. 125. s. 7, on pain of being foreclosed of such demand; whatever equitable claim might be founded by the surety on such neglect.

SCIRE FACIAS was brought by the defendant in error upon a judgment in C. B. against O'Kelly for 1260*l.* upon a bond dated the 20th of December 1800, with a condition, reciting that by indenture of the same date between S. Chiffney and Sparkes, reciting a grant of an annuity by his R. H. the Prince of Wales to Chiffney of 210*l.* during the life of his R. H. payable by the treasurer of his privy purse on the four quarterly days therein mentioned, Chiffney, in consideration of 1260*l.* had with the consent of his R. H. assigned the said annuity to Sparkes; and that it was agreed between the parties, that O'Kelly should give further additional security for the payment of the annuity by giving the bond in question: the condition of the bond was, *that if his R. H., or the treasurer of his privy purse for the time being, or any other person for his R. H., or O'Kelly, his heirs, &c. should pay to Sparkes the annuity on the quarterly days mentioned, the bond should be void, &c.* The declaration then suggested the issuing of the writ on the 22d of April in the 45 G. 3, on which judgment was obtained for a breach of the condition of the bond before, (which was satisfied,) and that after judgment recovered in E. 46 G. 3, Sparkes sued out his writ of *scire facias* on it, suggesting another breach in non-payment of the annuity, &c.: and then suggested for further breach, that though his R. H. was still living, *neither his R. H., nor the treasurer of his privy purse, &c. nor any other person, &c. nor the defendant O'Kelly*, had paid the annuity, &c.; and that 105*l.* for two quarters was due to Sparkes on the 5th of October 1806; for which he prayed execution, &c. To this O'Kelly pleaded in C. B. as to 52*l.* 10*s.* the first quarterly payment, that it accrued to the plaintiff Sparkes after the 5th of July 1795, viz. on the 5th of June 1806; and that the plaintiff then being a creditor of, and claiming to have the said demand against his R. H., did not deliver a particular in writing of the said demand, containing the nature and amount of it, and signed by the plaintiff, to the treasurer or principal officer of his R. H. at any time within ten days after the expiration of the quarter of a year in which such demand accrued, according to the stat. 35 Geo. 3. c. 125: and so pleaded the like plea to the second quarterly payment. The plaintiff replied as to the first plea, that at the time when the first quarterly payment of the annuity accrued to him, he was not, nor has he at any time since, been a creditor of his R. H. for the said 52*l.* 10*s.*, or any part thereof, nor did he then have or claim, nor hath at any time since had or claimed to have any debt or demand against his R. H. for the said sum, &c. And the same to the second plea. To which the defendant demurred, and assigned for special causes, that the plaintiff has not by his replication confessed and avoided or denied the matter stated in the first plea; but that it is an argumentative answer, and a departure from the declaration, inasmuch as the declaration states that the 105*l.* arrears of the annuity had not been paid by his R. H. or any other per-

son for him to the plaintiff, to whom it is stated to be due, and for which his R. H. as grantor is liable; and the plaintiff says in his replication, that he was not a creditor of his R. H. nor had any claim on him for the arrears; and it appears by the declaration, that his R. H. is indebted to the plaintiff in the said 10*l.* for the said two quarterly payments. On this demurrer the Court of C. B. gave judgment, 2 New Rep. 421, for plaintiff; and the defendant brought error, and assigned the common errors. The case was argued in this court in last *Trinity* term.

Bowen for the plaintiff in error contended, that taking the whole condition together, it appeared to have been the intention of the parties that *O'Kelly* should only be called upon to pay the annuity in default of the Prince of Wales, and of his treasurer appointed under the act of 35 G. 3. c. 125. for the payment of all demands on his R. H. out of the fund appropriated for that purpose: and this appeared by the recital in the condition of the original grant of the annuity to *Chiffney payable by the treasurer of his R. H's. privy purse, the consent of the Prince to the assignment of it to Sparkes*, and the agreement that *O'Kelly* should give further additional security for the payment of it. The first part of the condition restrains the generality of the latter part: and the obligee *was bound to shew that he had done every thing required by the act to obtain payment out of the fund originally made liable for this demand before he could resort to the further additional security of *O'Kelly*. In construing deeds the rule is, that subsequent clauses which are general shall be governed by precedent clauses which are more particular. *Thomas v. Howell*, 4 Mod. 69, recognized in 3 *Bac. Abr.* 393. *Grants, J.*, and Lord *Arlington v. Merrick*, 2 Saund. 414. And where the extent of the surety's undertaking is doubtful, the words are always construed strictly in his favour. *Stratton v. Rastall*, 2 Term Rep. 366. This is an attempt to treat the surety as the principal debtor, against the manifest intent of the obligation. 2dly, The surety cannot be liable if the principal be discharged. And by s. 7. of the act, every creditor whose demand accrued after the first quarterly day of payment of the Prince's revenue shall deliver into the treasurer's office a particular in writing of the nature and amount of such demand, signed by him, within ten days after the expiration of the quarter in which such demand accrued. And if any person having or claiming any debt or demand against the heir apparent shall not deliver in such particular in writing of it within the time specified, it is declared to be barred both in law and equity: and all bonds and other securities, the particulars of which are not so delivered in, are declared null and void to all intents and purposes. It is incumbent therefore upon a party, setting up any claim for a debt against the heir apparent, to shew that the requisites of the act have been complied with, without which no such debt can exist by law. [*Wigley*, contra, suggested that it did not appear when the original grant was made to *Chiffney*: it might have been before the act.] The date of the assignment to *Sparkes* was after the act, and therefore he ought to have delivered in the demand. The Court will only look to the party actually entitled to receive the annuity; and *Sparkes* is now the legal creditor of his R. H., as it seems now to be understood (a) that an annuity is assignable, especially if made so by express words; and as it is stated to have been assigned by the plaintiff in his declaration, it must be taken most strongly against him that it was assignable. So the Court will take notice of the party beneficially interested in a bond; as in *Bottomley v. Brooke* (b), *Rudge v. Birch*, M. 25 G. 3. B. R. cited in 1 Term, 622.; and in other contracts, as in *Howell v. Mac Ivers*, 4 Term Rep. 690,

(a) He referred to Co. Lit. 144 b. and Mr. *Hargrave's* note thereon, referring to 2 Vin. Abr. 515. 3 Vin. Abr. 251. *Gerrard v. Boden*, Hott. 80. Perk. a. 101. and *Maunder's* case, 7 Rep. 28. b.

(b) M. 22 G. 3. C. B. cited in *Winch v. Kesley*, 1 Term Rep. 621. See vide *Baerman v. Radentus*, 7 Term Rep. 663. and *Scholey v. Mearns*, 7 East, 148.

He also argued that the replication was a departure from the declaration for the reason before assigned as special cause of demurrer; and cited *Praed v. The Duchess of Cumberland*, lb. 585.

Wigley, contra. The act of the 35 Geo. 3. does not bear upon this question: or, if it do, still the surety is not discharged as the case now stands. 1st, This annuity is made payable out of the privy purse of his R. H., to which the surplus, if any, of every quarter's revenue is to be paid over by the act, and on which the general provisions of the act do not attach; for it would be nugatory to give in to the treasurer a particular of a demand which he is not required to pay. The act did not mean to restrain the bounty of the heir apparent out of the fund provided for his own personal expences. But if demands on this fund be within the act, the original grantee, and not the assignee of the annuity, was the proper person to make the demand. 2dly, This was not a debt for which the Prince was personally liable or could be sued. It is a mere direction to the treasurer of his privy purse to pay the annuity out of a particular fund; and in default of such payment, from whatever cause, the surety became liable immediately. And even though the principal should be discharged, there is nothing to prevent the surety from covenanting at all events for the payment of the debt: as one may bind himself or covenant for a minor, or feme covert, who would not be bound. And here, for aught appears, the surety may have bound himself after the demand of the grantee was forfeited for non-compliance with the act. He might engage to pay that which the principal was not bound to pay. Then the averment that the plaintiff was not a creditor of his R. H. at the time when the quarterly payment of the annuity accrued; by which must be understood, not a creditor upon the face of the record; is no departure from, nor inconsistent with, the declaration; because though the annuity were a voluntary one, as to the principal, still the surety may bind himself for the payment at all events if the principal did not.

Bowen, in reply, relied principally on this, that it appeared by the record that the Prince of Wales was once liable (for he was not less liable because the annuity was directed to be paid by his treasurer out of his privy purse, as where a man promises to pay a bill at his Banker's) for this demand, until he was discharged by the plaintiff's neglect in not making the demand of it required by the act; and therefore it appeared that the principal was discharged by the plaintiff's own neglect; which would discharge the surety.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This was a writ of error brought upon a judgment of the Court of C. P. in a *scire facias* on a bond of the defendant in the penal sum of 1260*l.* [After stating the record, his Lordship proceeded—] The apparent difficulty in this case has arisen from confounding two subjects which have no necessary connection with and dependant upon each other, *viz.* the right and means which the grantee of the annuity, or his assignee, may have to compel payment thereof from the funds of the principal, (in this case the Prince of Wales:) and the right and means of compelling payment from the obligor in a security-bond given, as this is, by way of an additional security for the payment of that annuity: which latter must of course depend upon the very terms of such additional security-bond, from which they are derived, and not upon the terms in which the principal had bound himself to his immediate obligee, nor upon the means of reimbursement which may eventually be had against such principal upon the ground of his own obligation. The bond of the defendant, on which this action is brought, is conditioned for the payment of an annuity of 210*l.*, described as granted by his R. H. the Prince of Wales, during his the Prince's life, to *Samuel Chifney*, payable by the treasurer of his Royal Highness's privy purse on four quarterly days of payment,

viz. 5th of Jan., 5th of April, 5th of June, and the 5th of October. The condition of the bond now in question runs thus: "That if his R. H. *George Prince of Wales*, or the treasurer of his privy purse for the time being, or any other person for his said R. H., or the said plaintiff in error, (*O'Kelly*), his heirs, executors, or administrators, did and should well and truly pay or cause to be paid to the defendant in error, (*Sparkes*) his executors, administrators, or assigns, during the natural life of his R. H. the Prince of *Wales*, an annuity or clear yearly sum of 210*l.*, by four equal quarterly payments, at or upon the 5th of *January*, the 5th of *April*, the 5th of *June*, and the 5th of *October* in every year; the first quarterly payment thereof to be made on the 5th of *January* next ensuing the date of the said writing obligatory: then the said bond to be void:" otherwise to "remain in force," &c. The condition of the bond, therefore, contemplates three other modes and sources of payment of the annuity, besides that to which alone the grant of it by the Prince of *Wales* refers: viz. payment by the treasurer of his R. H.'s privy purse. If it should remain unpaid by all the four several descriptions of persons, referred to by the condition of the bond as the possible paymasters of it, for one quarter day, the bond, on the expiration of that day, becomes forfeited, and the right to sue upon it accrues at the same instant; and of course, does not remain in abeyance and suspended during the ten days after the expiration of the quarter within which the particular in writing of the demand ought to be delivered to the treasurer of his R. H., in order to found a demand upon the funds of his R. H. under the stat. 35 G. 3. c. 107. s. 7. If a right in the obligee to sue upon the bond be, as no doubt it was, fully vested by the lapse of a quarter day without payment of a quarter's annuity; can it be argued, that it is capable of being divested in favour of the obligor by a subsequent neglect of the obligee to deliver a particular of demand, or to do any other act by which the obligor might mediate-ly or immediately have acquired the means of future reimbursement as against the funds of his R. H.? Whatever equitable claim may be founded on such circumstances, and to what extent such claim may be made available, it is sufficient in a court of law to say, that absolute legal rights of suit once fully vested and accrued by the breach of a condition of a bond are not at law thus defeasible. No case of the sort has been suggested in argument, nor I believe is any such to be found in our books. The plea therefore of the plaintiff in error, pleaded in bar of execution for the two quarters' annuity, on the ground of the original plaintiff's right to the same being defeated by such subsequent neglect, is insufficient and cannot be sustained at law. And if so, without considering the matter of the replication, and even assuming it to be liable to all the defects pointed out as special causes of demurrer, the plaintiff will, such replication notwithstanding, be entitled to recover the demand made by his declaration; such declaration being sufficient in point of law, and not answered by a sufficient plea on the part of the defendant. The judgment therefore which has been given in the Court of C. P. for the defendant in error must be affirmed.

Hunter v. Prinsep and Others.

10 East, 373. Nov. 25, 1808.

Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of the homeward-bound cargo, from Honduras Bay to London; and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's, into which they were carried by the recaptors, a sale of the cargo was directed by the Vice Admiralty Court there, on the application of the master acting *bona fide* for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners. Held that the freighter might recover such proceeds *in assumpsit* for money had and received, without allowing freight *pro rata itineris*. For such form of action for the proceeds of an illegal sale of goods is only a waiver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt, which admits of a set-off, &c.) but does not recognize the right of the vendor so to convert the goods. And here the act of conversion (for such it must be taken to be) being made by the master who is the general agent of the ship-owners; and not, as in *Baile v. Modigliani*, by the act of a Court of competent jurisdiction; was unlawful; and discharged the claim of the ship-owners for freight *pro rata itineris*.

But the plaintiff could not recover against the ship owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject matter by a contract not under seal, and signed by their master only, and not by themselves.

IN *assumpsit*, the plaintiff declared in the two first counts against the defendants as owners of the ship *Young Nicholas*, for not delivering mahogany and logwood, loaded on board that ship, in the bay of Honduras, upon freight for London, agreeably to the terms of the different bills of lading which had been signed for such goods by the master; but having before the goods arrived at London, without the plaintiff's consent and against his will, sold them, and converted the produce to their own use. The first count stated the promise to have been, to carry the goods on board the ship from Honduras to London, and there delivered them to the plaintiff; the dangers of the seas only excepted. The second count stated the exception to have been of the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever. The third count stated a delivery by the plaintiff to the defendants of 500 logs of mahogany and 100 tons of logwood; and that they, having sold and disposed of them, promised to render to the plaintiff a just and reasonable account of the sale and proceeds, but had refused to do so. The other counts were for goods sold and delivered, for money had and received, and upon an account stated. The defendants pleaded the general issue, and gave a notice of set-off, in the common form, for freight, work and labour, and money paid. At the trial at Guildhall a verdict was found for the plaintiff, subject to the opinion of the Court on the following facts: the damages (if any) to be settled by arbitration according to that opinion.

On the 3d of Sept. 1803, a charter-party of affreightment, under seal, was entered into and executed by the defendants, being owners of the ship *Young Nicholas*, and the plaintiff, as freighter, of her on a voyage from Falmouth to Honduras Bay, to fetch back from thence for the plaintiff a cargo of mahogany, with 60 tons of dye wood and logwood or fustick, to be delivered at London; the dangers of the seas and other unavoidable casualties always excepted. And by the terms of such charter-party the freight was stipulated and covenanted to be paid by the plaintiff to the defendants, in the following manner, *viz.* That the freighter should pay to the owners freight for the said cargo at the rate of 12l. 12s. per ton for mahogany, and for logwood or fustick at the rate of 8l. 8s. per ton of 20 cwt. at the king's beam, with 1s. 6d. per ton, in

lieu of port charges and pilotage, besides the primage therein specified : such freight, &c. to be paid as follows ; to wit, one third part on a right and true delivery of the said-homeward-bound cargo, and the remaining two third parts thereof by an excepted bill or bills on the freighter, payable at three months date from such delivery. And the parties reciprocally bound themselves by such charter-party to each other for the performance of the covenants and agreements contained in it, in a penalty of 8000*l*. The ship proceeded to *Honduras Bay*, where a cargo of mahogany and logwood, amounting to above 200,000 feet, was loaded by the plaintiff on board the ship for *London* ; and bills of lading for different parcels, with such different exceptions as are stated in the different counts of the declaration, were signed by the master of the ship for the delivery of such goods to the plaintiff, paying the before-mentioned freight for the same. The ship thus loaded, and having no other goods on board her, sailed from the bay of *Honduras* on her homeward voyage, on the 29th of *March* 1804 ; and on the 21st of *April* following, was so damaged in a storm as necessarily to put into *Savannah* in *Georgia* to repair : and the master (who was employed by the defendants) sold a part of the mahogany there to pay for the necessary repairs of the ship ; but the general average on that occasion has been adjusted and settled between the parties on the 8th of *July* in the same year, the ship, having been refitted again, put to sea with the remainder of her cargo in the further prosecution of her homeward voyage ; but on the next day was captured by a *French* privateer, and carried towards *Gaudaloupe*. On the 6th of *August* following, she was recaptured off that island by one of his majesty's sloops of war and sent to *St. Kitts* ; where, on the 5th of *September* following, she was driven ashore in a hurricane and wrecked ; but the then remaining cargo was saved. The wreck and cargo were by order of the Vice-Admiralty Court at *St. Kitts* put up to public sale, without the privacy or consent of the plaintiff or defendants ; except only as such consent may be involved in the fact of the master of the *Young Nicholas* having applied for the said order : he acting on that occasion according to the best of his judgment for the benefit of all parties concerned. The cargo produced (after paying 1-8th of the proceeds to the recaptors for salvage) 1776*l*. 19*s*. 10*d*. The ship netted about 200*l*. : and the proceeds of both were remitted to and received by the defendants. And this action is brought to recover the proceeds of the goods sold at *St. Kitts* and remitted to the defendants, who insist on retaining the whole thereof on account of freight, which they allege to be due *pro rata itineris*. The plaintiff, on the contrary, insists, that he is entitled to recover the value of the goods sold at *St. Kitts*, without any allowance for freight. The questions for the opinion of the Court were, Whether any freight were payable to the defendants, in respect of the cargo sold at *St. Kitts* ? If any freight were payable for the goods sold at *St. Kitts*, Whether such freight were to be calculated on the proportion of the voyage actually performed in point of time, or distance, or only on the proportionate diminution of expence between the rate of freight from *Honduras* to *London*, and the rate of freight from *St. Kitts* to *London* ? And also, Whether freight were to be allowed on the quantity of goods so sold, or only in the proportion their neat proceeds, when sold, bear to their prime cost on board, or to what they would have neat if delivered at *London* ? It was mutually agreed that when the rule had been given by the Court, the result should be settled by the arbitration of *William Ludlam* of *Lloyd's Coffee-house, London*, merchant in conformity to such rule.

Marryat, for the plaintiff, contended that no freight at all was payable in respect of the part of the cargo which was wrecked and sold at *St. Kitts*, and remitted to the defendants. There is great difficulty in collecting from the books any rule for ascertaining in what cases freight is due *pro rata itineris* ; but there is no case of rateable freight established except where the owner of the goods has, in consequence of the misfortune which has impeded the

due course of the voyage, prevented the ship owner from forwarding them to the place of their destination by disposing of them himself; or else where some new agreement has been expressly made, or is to be inferred from the circumstances, for the apportionment of the freight. But nothing of the kind is here found. In the case of *Luke v. Lyde*, 2 Burr. 832, and 1 Blac. Rep. 190, where *assumpsit* was brought by the ship owner for the freight, the goods were to be conveyed from *Newfoundland* to *Lisbon*, and were captured when within four days sail of *Lisbon*, and afterwards recaptured and carried into *Biddeford* in *Devonshire*, where the merchant agreed to accept his goods, without requiring the master to send them on to *Lisbon*; but on the contrary, altered the port of their destination, and sent them to *Bilboa* in another vessel: on which the master recovered *pro rata itineris*. The circumstances of that case might furnish a ground for an implied agreement by the merchant to pay freight *pro rata* rather than suffer the master to forward the goods by another conveyance to *Lisbon* when *Bilboa* was considered to be the better market. But at least, the merchant had the option to accept or abandon his goods; whereas here the plaintiff had no option; but the master has made an election for him, without his consent. In the subsequent case, however, of *Cook v. Jennings*, 7 Term Rep. 381, though the merchant accepted his goods at an intermediate place in the course of the voyage where the vessel was wrecked, yet he was held not to be liable for freight *pro rata*. And though that were an action of covenant on the charter-party, on which some reliance was had, as distinguishing that case from *Luke v. Lyde*: yet the court in general agreed, that where there was an express contract for the freight, it mattered not whether it were with or without a seal. Here the special counts state express contracts, which are verified by the facts found: and the other facts stated exclude the presumption of any new agreement. [Lord Ellenborough, C. J. An argument, I presume, will be urged against you founded on the nature of the action of *assumpsit* for money had and received, whereby it will be said that you have waived the tort and ratified the contract of sale, and must therefore take it with its consequences. What do you say to that?] There is no case where a party has been held to waive a tort, unless he had an option of suing either for the tort or upon the simple contract. In *Smith v. Hodson*, 4 Term Rep. 211, the plaintiff might have brought trover: but here there has been no wrongful conversion. But if the circumstances of the case shew a wrongful act in the master, like the tortious sale of goods by a carrier of his own accord, then as the contracts, and the breaches of them, are included in the special counts, which are framed upon the terms of the bills of lading, they are as much in disaffirmance of the act of the master as if the action had been laid in trover. He then argued on the second point respecting the mode of estimating the proportion of freight, if any, to be paid *pro rata*; which he said should be calculated according to the beneficial advancement of the voyage for the service of the owner of the goods; and consequently freight can only be due from *Honduras* to *St. Kitts*. And this should be computed on the salvage value, which was the rule adopted in *Luke v. Lyde*; and not on the tonnage, which was stipulated for by the charter-party on the supposition of a delivery at *London*. For if the defendants be entitled to any freight, it must be on an implied new contract, on which they could only demand what is equitable. Coals may be shipped at *Shields* for *London*, and after arriving near to the destined port, may be driven back and wrecked at *Newcastle*, where they would be worth nothing in advance of the original price, and the freight may be worth more than the value. It may be different where the owner agrees to accept his goods at an intermediate place in the voyage.

Richardson, for the defendants, contended that the special counts could not be supported, and that the true question arose upon the count for money had and received. The action is against the owners of the ship, and it is found that they contracted with the plaintiff for the carriage of the goods under seal;

therefore the terms of the contract cannot be altered, nor can they be bound by the master having signed bills of lading; though the latter would be liable in respect of his contract, as would the owners by implication, in respect of the act of their authorized agent, if they were not under an express contract of a higher nature. Besides, no breach is laid in the special counts for which the defendants are liable; for the failure of the voyage was occasioned by the perils of the sea, namely, the storm; though even capture has been held^(a) to be a peril of the sea: especially within the meaning of such an instrument as a bill of lading. Taking the case then on the general count, freight *pro rata itineris peracti* is payable wherever a voyage is in part performed, and the completion of it is prevented without the fault of the owner or master, and where the freighter takes to the cargo, or to such part of it as is saved. This was decided in *Lutwidge v. Gray*^(b); from whence it appears, that if the master offer to carry on the cargo to its port of discharge in another vessel, and the freighter refuse, the other shall have his full freight: and though he make no such offer, he shall have freight *pro rata*. In these cases the master is considered as the general agent for all parties. *Luke v. Lyde*, 2 Burr. 882, is express on the same point; though there the defendant received his goods from the recaptors, and not from the master: and though he had no benefit, but rather loss, from the carrying of his goods to *Biddford*; the freight being higher from thence to *Lisbon*, than from *Newfoundland*, where the goods had been originally shipped. So in *Mackrell v. Simond*, K. B. Trin. 16 Geo. 3, Abbott, 316, where the voyage was from *London* to *Canada* and back again, Lord *Mansfield* says, "If the ship be cast away on the coast of *England*, and never arrive at *London*; yet if the goods be saved, freight shall be paid, because the merchant receives advantage from the voyage." And *Baillie v. Modigliani*, K. B. Hil. 25 Geo. 3. Park. 53, is to the same effect. The principle of these cases is not contradicted, but rather confirmed, by *Cook v. Jennings*, 7 Term Rep. 381, and was admitted by Lord C. J. *Eyre*, in *Curling v. Long*, 1 Bos. and Pull. 634, and by Lord *Ellenborough*, *Mulloy v. Backer*, 5 East, 316. Then the acceptance of proceeds by the plaintiff in this case is equivalent to the receipt of the goods in the former cases; as appears from *Roccus de navibus et nauilo*, note 81; which was recognized in *Baillie v. Modigliani*, where the goods were sold as in this case, without the concurrence of the owner, but by the direction of the Court of Prize in *France*, before the restoration was decreed; and yet Lord *Mansfield* was of opinion that the owner could not take to the proceeds without payment of freight *pro rata*. Here the ship and goods were carried upon the recapture into *St. Kitt's*, where the Court of Vice-Admiralty had authority to award the sale of them for payment of the salvage. Then, though the master be the general agent of the ship owners, yet in case of extraordinary calamity he must also be considered as the agent of the owner of the goods, who has entrusted them to his care so as to bind him. In no respect can it be considered as a tortious act of the master, nor any excess of his authority, which arises out of the necessity of the case, and upon the exercise of a sound direction for the benefit of the owner. But if there were any doubt of that, the bringing the action of *assumpsit* for money had and received to recover the proceeds of the sale is a confirmation of the sale. In *Smith and Others, Assignees of Lewis and Potter, v. Hodgson*, 4 Term Rep. 211, the bankrupt had no authority on the eve of his bankruptcy to sell the goods to a creditor, with a view of giving him a preference; but the assignees having brought *assumpsit* for goods sold and delivered, the form of the action was held to be an affirmation of the contract of sale, so as to entitle the creditor to set off his debt. Next, as to the proportion of the voyage for which

(a) *Pickering v. Barkley*, 2 Roll. Abr. 248, and Styl. 182.

(b) Dom. Proc. Feb. 1733, *Abbott on Merchant ships*, 3d edit. 298.

freight is due; *St. Kitt's* must be admitted, upon the authority of *Roccus*(a) in the place before cited, to be the point to which freight is to be paid: being the place "*quo mercedes inventæ sint*:" and that is according to the justice of the case. But such freight is payable upon the quantity of the goods conveyed thither, without regard to their value. This was expressly so held in *Lutwidge v. Gray*, and in *Luke v. Lyde*; and is confirmed by the general principle, that freight is not affected by the good or bad state of the cargo. In *Lutwidge v. Gray*, the tobacco was in so bad a state, that it was even found necessary to burn a part of it: and in *Luke v. Lyde*, 1b. 887, Lord Mansfield said, "it is nothing to the master of the ship whether the goods are spoiled or not: provided the freighter takes them: it is enough if the master has carried them; for by so doing he has earned his freight." He afterwards says, that the freighter must abandon all or take all: he cannot pick and choose. "It is quite immaterial (he adds) what the merchant makes of the goods afterwards: for the master has nothing at all to do with the goodness or badness of the market." This essentially applies to a case like the present, where the freight was agreed to be paid by the tonnage.

Marryat, in reply, observed that the plaintiff here had exercised no option as to the taking of his goods at *St. Kitt's*; but they had been sold, and the money remitted to the defendants, before he had any opportunity of interposing and judging for himself; and this distinguished the present from all the former cases, except *Baillie v. Modigliani*, where the opinion quoted was not the point in judgment. In *Lutwidge v. Gray* the goods had arrived at their destined port, to which they had been forwarded, before they were burnt; and they were then destroyed, in order to avoid paying the duty for them. But if freight be due at all on equitable principles *pro rata itineris*, it is a rateable freight only ought to be paid for a rateable voyage: and if, when the goods are delivered, they be worth nothing in equity, nothing ought to be paid for them. The passage in *Roccus* does not specify what proportion is to be paid: and in the absence of any express authority, it ought to be measured by the benefit received by the owner of the goods. Then the form of the action, however it may limit the amount of the plaintiff's demand to the actual proceeds of the sale received by the defendants; and though, as in *Smith v. Hodson*, it may let in a set-off by the defendant, cannot amount to a recognition of an authority to sell the goods. In *Kitchen v. Campbell*, 3 Wils. 304, it was considered that the legality of the defendant's execution against the bankrupt's goods, after he had committed an act of bankruptcy, was triable either in trover for the value of the goods, or in *assumpsit* for the proceeds of the sale made by the sheriff, and paid over to the defendant.

The case stood over for a few days: and now

LORD ELLENBOROUGH, C. J. delivered judgment. This case, which was argued on *Tuesday* last, stood over, rather for the purpose of our looking into some of the cases cited, particularly that of *Baillie v. Modigliani*, Park 53., than from any doubt which the court entertained upon the main points of the case now in question. It will be recollected that it was an action of *assumpsit*, brought by the plaintiff, a shipper of goods on board the ship *Young Nicholas*, of which the defendants were owners. The parties had mutually contracted by a charter-party of affreightment under seal, executed between them, for a voyage from *Falmouth* to *Hondurus Bay*. The defendants were to fetch back from thence for the plaintiff a cargo of mahogany, logwood, &c. to be delivered at *London*, "the dangers of the seas and other unavoidable casualties always excepted." By the charter-party the freight was stipulated to be paid in particular modes and proportions on a *right and true delivery of the same homeward-bound cargo*. This *right and true delivery* of the homeward-bound cargo at the port of its destination never took place; as the ship, after taking

(a) Vide 2 Burr. 889.

in such cargo at the Bay of *Honduras*, was first damaged by a storm, and driven into *Savannah* in *Georgia* to repair: was afterwards, in the further course of her voyage, captured by a *French* privateer; then re-captured by a king's ship and sent into *St. Kitt's*, where she was driven on shore in a hurricane and wrecked: but the remainder of the cargo (of which part had been before sold at *Savannah* for the expence of repairs) was saved: and upon the application of the Captain to the Court of Vice-Admiralty at *St. Kitt's* for an order for that purpose, was together with the wreck of the ship, there sold, without the privity or consent of the plaintiff, or of the defendants. The cargo upon such sale neated, after payment of 1-8th salvage to the recaptors, 1776*l.* 19*s.* 10*d.*, which was, together with the proceeds of the ship remitted to and received by the defendants. The action was brought by the plaintiff to recover these proceeds of the cargo sold at *St. Kitt's* from the defendants, who had so received them. The defendants insisted upon retaining the whole of such proceeds on account of freight, to which they claimed to be entitled *pro rata itineris*. The plaintiff insisted upon his right to recover the whole of these proceeds, without making to the defendants any allowance for freight. The declaration in which this recovery was sought contained three special counts in *assumpsit*, founded two of them upon two bills of lading signed by the master, containing the first of them an exception of "the dangers of the seas;" the second, "of the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, navigation," &c. Upon these two special counts the plaintiffs clearly could not recover; both because they contained an express exception for the very perils by which the loss of the voyage was occasioned; and also because the plaintiff, having contracted with the defendants by charter-party under seal, could not charge the defendants in respect to the same subject-matter in virtue of a contract not under seal, and signed by their master only, and not by themselves.

As to the 3d count, whether the law would imply any such promise to account for the proceeds of a cargo, wrongfully sold and converted, upon the ground of such conversion only, as is therein stated, is the less material to be considered, as the same merits on the part of the plaintiff are open for discussion on the count for money had and received, and upon which count the question between the parties distinctly arises: which is, whether the defendants have a lien upon and can claim to deduct their freight *pro rata itineris* out of the proceeds of the cargo sold at *St. Kitt's*, and which are now in their hands. It was contended, on the part of the defendants, that the money for which the goods sold is a substitution for, and properly represents, the goods themselves: and that as the defendants would, if the goods had subsisted in specie, have had a lien upon them for their freight, and would be entitled to have carried them if they could in the same ship, or to have hired another for that purpose, and so to have earned their full freight: or, if the plaintiff had taken them out of their hands before the voyage was completed, would have been entitled to have claimed freight *pro rata itineris* against him: so, now, the plaintiff, having sued for the proceeds in this form of action "for money had and received," has, in virtue of his so suing, adopted and confirmed the act of the master, by which the goods were converted into money, by which the further conveyance of them in the course of the voyage was prevented, and by which of course the full freight of them was prevented from being earned. But the fallacy of the argument on the part of the defendants appears to us to consist in attributing more effect to the mere form of this action, than really belongs to it. In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint with a view to damages, of the tortious act by which the goods were converted into money; and takes to the neat proceeds of the sale as the value of the goods; subject, of course, to all the consequences of considering the demand in question as a *debt*, and, amongst others, to that of the defendants' having a right

of set-off, if they should happen to have any counter demand against the plaintiff. But we have been much pressed with the authority of the case of *Baillie v. Modigliani* as supposed to be similar to the present: and in which Lord Mansfield is stated to have said, "In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was due *pro rata itineris*. This however, as every other proposition laid down by a Judge, ought to be understood with particular reference to the facts of the case then before the Court. That was the case of a ship sailing with goods from *Nevis* to *Bristol*, which was captured in the course of the voyage, carried into *France* and condemned there: but the sentence of condemnation was afterwards reversed, and restitution awarded. The ship and cargo had, however, in the mean time been sold: but the proceeds of the sale had been paid, as it should seem from the note, to the owner of the goods, deducting the charges of the appeal: and the owner of the goods had out of the money paid the owner of the ship freight *pro rata itineris*. Of this payment of freight the owner of goods claimed the reimbursement from his underwriters upon a policy on goods: but it was properly answered on the part of the defendant, and the Court held accordingly, that the insurer on goods was not liable to have the charge of freight thrown upon him because he had not engaged to indemnify against it: and this was sufficient for the decision of the only question then directly in judgment before the Court. But it appears from the note of that case, that Lord Mansfield did in that case further hold, that freight *pro rata itineris* was a charge upon the proceeds of the goods sold in the hands of the owner of the goods to whom those proceeds had been rendered in lieu of his goods. But in what case, and under what circumstances, did Lord Mansfield so hold? Was it in the case of tortious unauthorized sale, as the one now in question must be taken to have been; particularly since the late case of *Reid v. Darby*, Ante, 143, decided in this court in *Trinity* term last? Or in a case in which the competency of jurisdiction of the several courts which condemned and restored was unquestionable: where if the ship and goods had been restored in specie, the right of the ship owner to earn full freight, by carrying the goods to the delivering port, was entire: and where the possibility of doing so had only been prevented by the act of the Court or its officers, in making sale of the goods pending the suit, and by no fault on the part of the owner of the ship? And however just it may be, that a substitution of money for goods, made by the authority of a competent tribunal, shall be equivalent to the actual restitution of the goods themselves, as far as respects all interests in and liens upon that fund; and however reasonable it may be that an owner thus taking the substitute, which requires no further conveyance, should be considered as virtually dispensing with the further duty of the ship owners, which would have remained to be performed if the goods had still continued in specie; yet, no such dispensation with the duty of further conveyance on the part of the owner of the goods can be implied in a case like the present, in which the further conveyance of them is rendered impossible by an act of the immediate agent of the ship owners themselves, to which he, the owner of the goods, is neither actually nor virtually consenting by himself, or any other agent empowered to consent on his behalf; and to which he is not compelled to submit by any regular exercise of legal authority in any quarter whatsoever; and from which he can, according to what is contended for on the part of the defendants, derive no benefit whatever; inasmuch as the *pro rata freight* claimed by them exceeds the whole amount of the proceeds of the goods sold. Upon this view of the case of *Baillie v. Modigliani*, compared with the present, it affords no authority adverse to the claims made by the plaintiff in the present action. The principles which appear to govern the present action are these: the ship owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties:

and the freighter undertakes, that if the goods be delivered at the place of their destination he will pay the stipulated freight: but it was only in that event, *viz.* of their delivery at the place of destination that he, the freighter, engages to pay any thing. If the ship be disabled from completing her voyage, the ship owner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the ship owner will not forward them, the freighter is entitled to them without paying any thing. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the ship owner has no right to withhold the possession from him, unless he has either carried his freight, or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for selling the goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and therefore entitled the plaintiff to the entire produce of his goods, without any allowance for freight. The postea must therefore be delivered to the plaintiff(1).

(1) If the cargo be not carried to the port of destination, no freight can be demanded: If voluntarily accepted at any other port, freight *pro rata itineris* is due. But if it is received by compulsion, by the supercargo or the captain, acting for the best of all concerned, with a view to preserve it for the person entitled to receive the proceeds, no freight is earned. *Hurtin v. Union Insurance Company*, C. C. U. S. April 1806. *Condy's Marshall*, 281.

Assumpsit for freight on a voyage intended to have been from *Shields to Hamburgh*. The ship was prevented from going to *Hamburgh* by a government vessel, and put into *Gluckstadt* by direction of the consignees, who there received a part of the cargo, when the ship was ordered back to *Shields*. The court held, that freight *pro rata* was earned on that part of the cargo accepted by the consignees. *Christy v. Row*, 1 Taun. 300.

A ship was insured from *New-York to Algiers* with liberty to touch at *Cadiz*. From causes within the perils insured against the ship and cargo were sold at *Cadiz* by the insured, who was master and joint owner and consignee of the cargo. In an action on the policy the court held that freight to *Cadiz* was earned, and would not disturb a verdict, in which the jury found accordingly, on the ground that the master might fairly be considered as acting in the capacity of owner, and accepting the goods by the sale at *Cadiz*. *Williams v. Smith*, 2 Caines 18.

In *Robinson & al. v. The Marine Insurance Company*, 2 Johns. 233, which was an action on a policy of insurance on freight, the vessel was driven out of her course, and compelled, by perils of the sea, to put into a port short of her original destination, where the goods were received by the supercargo. The court decided that acceptance of the goods at any intermediate port raised an *assumpsit* to pay freight *pro rata itineris*.

Goods were shipped from *Amsterdam to Virginia*, but the vessel was obliged to put into a port in *Massachusetts*. The owner of the goods wrote to a correspondent in *Boston*, requesting him in case the ship should not be directed to *Virginia*, to have his goods stored and transmitted by the first opportunity; which was accordingly done. The court held that freight *pro rata itineris* was earned. *Hoe & al. v. Mason*, 1 Wash. 207.

The defendant promised to pay the plaintiff a certain sum for a passage for himself and family, and for the freight of two horses from *New-Haven, to Trinidad*. The vessel was captured, recaptured and carried into *Martinique*. The defendant compromised for salvage with the recaptors, and immediately sold the horses before the plaintiff had a reasonable time to proceed on the voyage to *Trinidad*. It was adjudged, that the defendant was liable for freight of the horses *pro rata*, after deducting salvage, but that no passage money was earned. *Pinto v. Atwater*, 1 Day 193.

If however there has been no acceptance of the cargo at an intermediate port, it seems clear that freight *pro rata itineris* is not due. *Osgood v. Groning*, 2 Campb. 466. *Barker v. Cheriote*, 2 Johns. 352. *Armroyd & al. v. The Union Insurance Company*, 3 Binn. 437. *The United Insurance Company v. Lenox*, 1 Johns. Cas. 383.

But in giving the opinion of the court in the case of *Dorr v. The New-England Marine Insurance Company*, PARSONS, C. J. said, it might be admitted as a general rule, that when a vessel is wrecked so that she cannot carry her cargo to the port of delivery, but the cargo is safely delivered to the owner who may ship it in a reasonable time on board other vessels

The King v. The Inhabitants of Woburn.

10 East, 395. Nov. 26, 1808.

A rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another, touching the settlement of a pauper, although the nominal parties be the churchwardens and overseers of the poor of the respective parishes; and being as such party directly interested in the event of that proceeding, he cannot be compelled to give evidence by the adverse parish, even since the stat. 46 Geo. 3, c. 37, not being within the words or meaning of that law.

UPON an appeal by the churchwardens and overseers of the poor of the parish of *St. Alban* in the county of *Hertford* against an order of justices for the removal of *Mary Brown*, widow, and her children, from the parish of *Woburn* in the county of *Bedford* to *St. Alban*, *John Hilliard*, an inhabitant of the appellants' parish of *St. Alban*, and rated and paying to the poor's rates of the said parish, was called as a witness on the part of the respondents, and refused to give evidence. The Sessions were of opinion that the said *John Hilliard* was not compellable to give evidence, and quashed the said order; subject to the opinion of this Court on the point.

Topping and Peckwell, in support of the order of Sessions, contended, 1st, that the witness was privileged from giving evidence by being a party to the suit. 2dly, As being directly interested in the question, and therefore not within the act of the 46 Geo. 3. c. 37; but rather, if at all, within the exception of that act, as exposing him to a penalty. First, though the churchwardens and overseers of the poor are under different acts the representatives and trustees of the parish; yet they have no power to appeal against an order of removal, except as inhabitants: for the stat. 13 and 14 Car. 2. c. 12. s. 2, gives the appeal to "all such persons who shall think themselves aggrieved," &c.; and such persons are aggrieved, not as parish officers, but as inhabitants paying to the rates, out of which fund the expence of maintaining the pauper is to be borne, as well as the costs of the appeal. Therefore though

to the port of delivery, he shall not abandon the cargo, but shall pay the original ship a *pro rata* freight, 5 Mass. Rep. 231.

In an action of covenant on a charter-party, it appeared that when about three fourths of the voyage was performed the vessel was much injured by running against another vessel in the night. In this situation, the crew being greatly exhausted, she was overtaken by a schooner. The crew came on board the schooner, four of whose hands went into the ship, and navigated her safely to port. The court held that this was not such a delivery as entitled the ship owner to freight under the charter-party. *Post & al. v. Robertson*, 1 Johns. 24. See also *Dunnell v. Tomhagen*, 3 Johns. 154.

A vessel was chartered on a voyage from *New-York* to *St. Domingo*, and back to *New-York*. On arriving in sight of *St. Domingo*, she was turned away by a British cruiser, the port being blockaded, and returned with her cargo to *New-York*. In an action of trover, for goods detained for the freight, the court said, that by the blockade the charter-party was dissolved, and that this was not a case for *pro rata* freight. *Scott v. Libby & al.*, 3 Johns. 336.

In *Van Oheron v. Dowick & al.*, 2 Campb. 42, though no objection with respect to freight arose, yet the principle of the case in the text appears to be recognized. The captain being driven into a foreign port, sold the cargo for the benefit of the shippers. This was done without orders, but *bona fide* for the interest of all concerned. Lord ELLENBOROUGH said, expediency might require this step, but the captain could not put himself in the situation of the owner of the goods; and when he thus disposed of them, in point of law, he was guilty of a tortious conversion.

In case of insurance on ship and freight and abandonment to the underwriters which is accepted, and the ship afterwards proceeds and earns freight, the insurers on the freight are entitled to her earnings before those on the ship to her earnings after the abandonment to be allowed to each *pro rata itineris per acti*. *The United Insurance Company v. Lenox*, 1 Johns. Cas. 277. S. C. in Error, 2 Johns. Cas. 443. *Leavenworth v. Delafield*, 1 Caines, 573. See also *Davy v. Hallett*, 3 Caines, 16. *Mc Bride v. The Marine Insurance Company*, 7 Johns. 432. *Armroyd & al. v. Union Ins. Co.*, 3 Binn. 437.

the churchwardens and overseers may be the nominal, yet the inhabitants of the parish paying to the rates are the real parties to the suit: and that is further exemplified by the practice of entitling the cause after it is removed into this court, which is "the King against the *Inhabitants*," &c. The like consideration obtains in equity in all cases where parishioners are interested in a suit: they are considered as the real parties, though the churchwardens and overseers may be the nominal parties, *Bridgman's Annal*, *Index to Chan. Rep.* passim. This differs from the case of a corporator, *Peake's Evidence*, 149, 161, who may be a witness in any cause in which the corporation are parties, if he be not personally interested in the result, but only in respect of the common corporate fund. Then if the witness called be a party to the suit, clearly he is not within the late statute. 2dly, Whether or not in form a party, the witness was immediately interested in the event of the suit. The costs of the appeal and the burthen of maintaining the pauper, if settled in the witness's parish, are charges on the rates, by which his quota may be increased. This has always been considered as interest sufficient to exclude such an one from being called by his own parish to give evidence for them: and must therefore be sufficient to protect him from being compelled to give evidence against himself. In this respect the case is very different from *Rex v. Little Lumley*, 6 Term Rep. 157, where the parishioner, who was compelled to be examined as a witness for the adverse parish, was not rated at the time. It was not in the contemplation of the Legislature when they passed the act of the 46 Geo. 3, to compel one who was directly interested in the very question and suit in judgment to give testimony against his own interest. The very wording of the act shews that they looked to an interest in some other civil suit. They declare, "that a witness cannot by law refuse to answer a question, relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to *expose him to penalty* or forfeiture of any nature whatsoever, by reason *only*, or on the *sole* ground, that the answering of such question *may* establish or *tend* to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of *his majesty*, or of *any other person or persons*." If this case come within any of the words of the act, it is within the exception as exposing the witness to a *penalty*; for it subjects him to a distress, and to personal imprisonment, by stat. 42. Eliz. c. 2. s. 4, in default of sufficient distress: (and the question must depend on the witness's interest and situation at the time he was required to be examined:) but in no event could it subject him to a civil suit either at the instance of the king or of any other person. And these latter words sufficiently shew that the suit contemplated by the act was one to be afterwards instituted against the witness himself in consequence of the evidence he is compelled to give at the trial, and not the very suit in which the evidence was given. It never could have been made a doubt before the statute, but that a person who was directly in the result of the suit in judgment was not a competent witness in support of his interest, nor was compellable to be examined against it. Bills of discovery in equity were meant to supply the defect of the courts of law in this respect. There are cases in the books, such as *Tittle v. Grevelt*, 2 Ld. Ray. 1008, where it is said that a witness, though he may, shall not be compelled to give evidence which would subject him to acivil action. And there were many other decisions the other way. The statute however has now disposed of every such objection, upon which alone any doubt could ever have been entertained before that time. [The case of *The King v. St. Lawrence in Winchester*, Burr. S. C. 588, having been referred to by the counsel for the respondents, as in point; where on a question of settlement between the parish of *St. Maurice* and *St. Lawrence in Winchester*, a parishioner of the latter, who was rated to the poor there, was subpoenaed by the adverse parish and compelled to give evidence against his own parish, notwithstanding his objection to it.] They answered, that it seemed as if the witness had last waived his privilege; for the counsel in support of the order

of Sessions there observed that the witness did not *persist* in refusing to give evidence : and Lord *Mansfield* only said, that it was scandalous to *make* the objection ; and that in cases of that kind it was reasonable that the truth of the facts should be fairly inquired into, *and that was a ready way to come at it* ; a reason which would equally apply to compelling a defendant on the record to give evidence against himself. And as to the case of *Cox v. Whalley* there referred to in a note, as one wherein the same objection had been overruled : they said it was certainly a mistake : as appeared by the following note of it ; which was now read in court.

"*Cox v. Whalley and Others*, sittings at *Westminster* after Mich. 1779, before Lord *Mansfield*, C. J. It was an action by the master of a tavern for a dinner provided by the joint order of eight persons, four of whom were made defendants in that action. The plaintiff called one of those who was not sued, to prove that the entertainment had been provided as stated. The witness himself objected that being a party, he ought not to be examined : and the objection was supported by the defendant's counsel. On the other side Mr. *Dunning*, for the plaintiff, said that it was competent for the plaintiff to examine any witnesses whose interest might incline them against him ; although the witness might by his testimony charge himself. And Lord *Mansfield* disallowed the objection, and ordered the witness to be examined. He said that a person against whom a bill is filed for a discovery cannot demur to it on the ground of his having an interest against the party so calling him."

The Attorney General and Best, contra. As to the question, whether or not the inhabitants of the parish were all parties to the suit, it must be decided by looking to the title of the appeal as it is entered at the sessions, where the question arose, on the objection taken, and not as the case is intitled when removed into this Court by certiorari ; and there the churchwardens and overseers of the poor of the parish are the only parties to the suit known to that Court. And in a court of law none but those who are the actual parties to the suit on the record can be privileged as such from giving evidence, when called by the adverse party, now that all objection on the score of giving evidence against their own civil interests is done away by the statute. Therefore there seems no reason why a cestuy que trust in an action by or against his trustee may not be called as a witness by the adverse party. The case of *The King v. St. Lawrence in Winchester*, Burr. S. C. 588, is an express authority to shew that a parishoner, though paying to the poor rates of one parish, may be called as a witness by an adverse parish litigating with the other a question on the settlement of a pauper. And so far as the technical objection goes to the calling a parishoner as a witness who, it is said, is in effect a party, the authority of that case is confirmed by *The King v. Little Lumley*, 6 Term Rep. 157 : for in that view of the question, it is immaterial whether the parishoner were actually rated at the time. If the inhabitants of the parish, and not the churchwardens and overseers of the poor, be considered as the real parties to the suit the only difference between one who is rated, and another who is omitted in the rate, is on account of his *interest* ; which the statute has now removed. If however, rated inhabitants are alone to be considered as parties to the suit, one consequence must follow, which has never hitherto been admitted in practice, that the declarations of any such inhabitants as to the matter in issue may be given in evidence by the adverse parish ; for even the declaration of a mere trustee, being a nominal party on the record, was held in *Baerman v. Radenius*, 7 Term Rep. 663, to be evidence against his cestuy que trust. Taking him however to be an inhabitant, having rateable property in the parish, for which he is rated, and therefore as being consequentially interested in the decision of the appeal, still he is not in the same situation as a party to a suit. He is not bound to appear, nor to take any notice of the proceedings going on against his parish : the inhabitants may perhaps eventually be called upon for contribution to a rate, but no process lies to

compel their appearance in court. So neither can the judgment affect him immediately. Suppose the pauper adjudged to be settled in the witness's parish, and the parish refuse to receive or provide for him; the parish officers may be indicted, but not the witness as a mere parishioner. He cannot be pursued by any process which can issue upon such a judgment, as a party to the suit may. The costs awarded cannot be levied upon him, but are only payable out of the general fund by the parish officers, and they alone are answerable for the payment. The making of a rate by those officers, out of which the pecuniary charges of the costs, and of the future maintenance of the pauper settled upon them, are to be defrayed, is a matter altogether collateral to the judgment of the Sessions. Neither does it follow necessarily that the witness will be personally amenable to the remedies given to enforce payment of the rate; for he may rid himself of any personal responsibility by removing out of the parish, though his property might be affected by it: but that objection goes merely to his interest, which is removed by the late act. At any rate, the interest of such a witness in the question is very remote; and it would be a strange construction of the act, to say that it shall not shelter one who has a direct interest in refusing to answer a question which will certainly subject him to an action for a debt; but that it shall shelter one who has a more remote interest, which can only be reached by a future collateral proceeding, which he may avoid altogether by removing from the parish. The exceptions in the act as to not compelling a witness to *accuse* himself of any offence or to subject himself to any *penalty or forfeiture*, can in no fair construction of the word *penalty*, as there used, be applied to the remedies given for collecting the poor rate. And they urged the inconvenience which might ensue from holding that such a witness was not compellable to answer, (and which it was suggested had occurred in the particular case) if after giving evidence which prevented the removal to another parish, on the ground of a settlement in his own, the adverse parish should not be able to avail itself of that testimony when the removal was made up upon that evidence to the witness's parish.

The Court said, that the question being of general consequence, as involving the construction of the late act, they would advise upon it before they delivered their opinion. And *Le Blanc, J.* observed, that if the Sessions had been aware at the time of the extent of the question, there would have been no difficulty: for if the witness were rejected on the ground of his being a party to the suit, his declaration of any facts touching the matter in issue would necessarily have been evidence against him.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This Sessions case was argued on *Wednesday* last, and the Court wished to consider, whether the very ungracious objection, made by a rated inhabitant of the appealing parish, to be examined as a witness, when called upon by the respondents, were well founded; and, on consideration, we are of opinion that it was. The parties appealing before the court of quarter sessions, as appeared by the proceedings returned to this court, were the churchwardens and overseers of the parish of *St. Alban*; which at first seemed to afford an answer to the objection; that the inhabitant proposed to be called was not a party to the proceeding: but in reality the appeal is by them on behalf of the inhabitants of the parish, who are all of them, paying to the rates, the parties grieved, and are all directly and immediately interested in the event of the proceeding, by which the maintenance of the pauper is to be fixed on them, or removed from them, as well as the costs. It is a long established rule of evidence, that a party to the suit cannot be called upon against his will by the opposite party to give evidence; and we think that the late act of the 46th of the king does not break in upon this rule. That act takes away the right of objecting by reason only, or on the sole ground, that the answering the question may establish, or tend to establish, that the witness owes a debt, or is other-

wise subject to a civil suit. But that is not the ground of the present objection; nor does it appear to us to have been the intention of the legislature by this act of parliament to alter the situation of parties to a suit or proceeding, more especially in a proceeding such as the present, where the situation of *Hilliard*, the person proposed to be examined, did not bring him within the words of the act, nor the inconvenience intended to be remedied by it. We therefore are of opinion that the Sessions have properly determined the party not to be compellable to give evidence. And that their order, quashing the order of the two justices, must be affirmed(1).

The King v. The Justices of Wiltshire.

10 East, 404. Nov. 28, 1808.

Though an appeal against an order of removal has been entered and adjourned once by virtue of the stat. 9 Geo. 1. c. 7. s. 8., and though the justices in sessions have a discretionary power to determine whether reasonable notice has been given of the appellant's intention to proceed on the trial of such adjourned appeal; yet if they dismiss the appeal at such adjourned sessions without hearing it, on the ground that they have no authority to try it for want of a sufficient length of notice to the respondents according to a new rule of practice promulgated two sessions before, but then first acted upon, and which was not known to the appellant's attorney who had given the former usual notice, this Court will grant a mandamus to the Sessions to enter continuances and hear the appeal.

THIS was a rule calling on these justices to shew cause why a writ of mandamus should not issue, commanding them to enter continuances upon the appeal of the inhabitants of the parish of *Stourton* in *Wills* against an order of removal of a certain pauper from *Mere* to *Stourton*, and to hear and determine the said appeal.

This was founded on an affidavit of the appellant's attorney, living at *Wincaunton* in *Somerset*, by which it appeared that he was applied to by the parish officers of *Stourton*, on the 19th of *April* last, to enter the appeal and get it respited until the next sessions; in consequence of which notice of appeal and of the intended motion to respite was given to the respondents. That the next sessions which was held on the 26th of *April*, when the appeal was entered and respited to the *Midsummer* sessions which was held at *Warminster* on the 12th of *July*. On the 2d of *July*, the appellant's attorney learnt for the first time that the Sessions had made certain rules for their practice, which were not published till after the *April* sessions, nor acted upon or officially circulated till the *Midsummer* sessions, by which it was required that on trials of appeals the notice of trial was to be given on or before the *Monday* in the week next before the sessions, otherwise the notice to be deemed insufficient: and that the like notice was to be given in the case of respited appeals, unless, &c. That on *Tuesday* the 5th of *July*, notice of the appeal was served on the respondents at 6 o'clock in the morning, dated the day before, being as soon as the signatures of the parish officers could be obtained. That the usual notice theretofore required in such cases in this and the neighbouring counties was given in this case. That the appellant's attorney attended the *Midsummer* sessions on *Tuesday* the 12th of *July*, and on the next day the appeal was called on, when the respondents objected that the notice had not been given in time. That the appellants then applied to the Court for an adjournment under the circumstances, offering to pay the costs of the day; but the Court refused it, thinking they had no power to do so. Affidavits were also read in answer to this rule, alleging that the new order of practice was made at the preceding *January* sessions held at *Devizes*; and that notice of it was immediately after promulgated in the county. That the appellant's attorney lived only 5 miles

(1) Vide *The King v. The Inhabitants of Killerby*, ante 292, and note.

from *Stourton*, though in the county of *Somerset*: and that the litigating parishes were very near to each other.

Garrow, R. Williams, and Casberd, shewed cause against the rule, and contended that the magistrates were the sole judges by the act of the 9 Geo. 1. c. 7. s. 3. of what was reasonable time for giving notice of appeal; and having laid down a rule for regulating their discretion, of which notice had been promulgated at two preceeding sessions, all persons were bound to take notice of it; and that the appellants thinking proper to employ an attorney, who happened to live just without the bounds of the county, could not differ the case. The act of the 13 & 14 Car. 2. c. 12. s. 2. first gave the appeal to the next Sessions, which has been construed to be the next possible Sessions: after which the stat. 9 Geo. 1. c. 7. s. 8. directs that "if it shall appear to the justices that reasonable time of notice was not given; then they shall adjourn the appeal to the next Quarter Sessions, and then and there finally determine the same." But this only empowers the justices to make one such adjournment upon the ground of the want of time for the appellants to give reasonable notice of their appeal; and having once before exercised that jurisdiction in the present instance, they had no authority to make a second adjournment on account of the same default. But if they had a continuing jurisdiction in that respect; yet as it could only be legally exercised if the justices were of opinion that in fact there had not been sufficient time before the Sessions to give reasonable notice of appeal to the respondent parish, and they being of opinion that reasonable notice might have been, but had not been given in the particular case, the question was thereby concluded, and this Court will not interfere to control that judgment.

The Attorney-General, Jeykell, and Grant, in support of the rule, were stopped.

LORD ELLENBOROUGH, C. J. The magistrates certainly had a discretion to exercise with respect to what was reasonable time for giving the notice of appeal; but we have also a kind of visitatorial jurisdiction over them, in the exercise of such a discretionary power; and we think that in this case they have not exercised that discretion in a way that we ought to give effect to; but that we ought to interfere and correct it. Here it appeared that a new rule of practice with respect to giving notice had been recently made by the Sessions, of which the appellant's attorney had no knowledge, but he conformed himself to the former practice; and, under these circumstances, it would be too much to conclude the appellants from having their case heard.

Per Curiam,

Rule absolute(a):

Butler v. Brushfield.

10 East, 407. Nov. 28, 1808.

Bail in error is not necessary upon the stat. 3. J. 1. c. 8. in debt on bond conditioned for the payment of money, and also for performing all covenants in a mortgage deed.

MARRYAT shewed cause against a rule for setting aside an execution executed pending a writ of error; and the question was whether bail in error (which had not been put in) were necessary? It was an action of debt upon

(a) Though by the stat. 13 & 14 Car. 2. c. 12. the appeal was to be lodged at the next Quarter Sessions, yet when it was so lodged, the justices might have adjourned it *toties quoties* the purposes of justice required. Vide the case of *The King v. Lumley Parish*, 2 Salk. 605. And there is nothing in the stat. 9 G. 1. to restrain their general power in this respect, but rather to compel the adjournment in the first instance where reasonable notice has not been given. Vide *The King v. The Justices of Buckinghamshire*, 3 East, 842. and *The King v. The Justices of Shropshire*, (by mistake printed *Staffordshire*), 7 East, 549.

a bond conditioned for payment of 1100*l.* at a certain day, and also for performing all covenants in a mortgage deed of even date with the bond; and he cited *Desbordes v. Horsey*, 2 Stra. 959., where the condition of the bond was for the payment of money on such a day *being the same sum mentioned in certain indentures of such a date*; which latter words it was contended by the plaintiff in error excused him from giving bail, because the words of the stat. 3 J. 1. c. 8. are bonds *for payment of money only*; and that was a bond for performance of covenants: but the Court held that bail was necessary; the material part of the condition being the payment of the money; and the other words being only added to shew that they were only different securities for the same debt.

Lord ELLENBOROUGH, C. J. There the bond was conditioned for payment of *money* only; but this is for performing all the covenants in the mortgage deed, amongst which there may be many covenants besides that for the payment of the money.

Per Curiam,

Rule absolute(a).

The King v. Hubbard.

10 East, 403. Nov. 28, 1808.

One in custody by attachment for nonpayment of money under 20*l.*, found due by an award made a rule of Court, is not entitled to his discharge under the stat. 48 Geo. 3. c. 123, that being confined to persons in execution *upon any judgment*.

THE defendant was in custody upon an attachment for non-payment of a sum under 20*l.* found due by an award, which had been made a rule of Court; and *Peake* had obtained a rule for his discharge by virtue of the stat. 48 Geo. 3. c. 123., and cited *Rex v. Stokes*, Cowp. 136, where one in custody on an attachment for non-payment of costs under the stat. 5 & 6 W. & M. c. 11. 3, was discharged under the Lord's Act 32 Geo. 2. c. 28. s. 13., which extended relief to persons charged *in execution* for any sum not exceeding 100*l.* This rule was now resisted by *Jervis* and *Dampier*, on the ground that the act in question was worded differently from the Lord's Act, and was confined to relieve prisoners "in execution *upon any judgment*" for any debt or damages not exceeding 20*l.* &c. And, on adverting to the words of the statute, *The Court* were of opinion that it only extended to persons in execution on judgments; and discharged the rule.

(a) Vide 2 Balstr. 54. and Carth. 28.

CASES

IN

HILARY TERM,

IN THE FORTY-NINTH YEAR OF THE REIGN OF GEORGE III.

Wright, Clerk, v. Smythies, Clerk.

10 East, 409. Jan. 24, 1809.

Where successive rectors had been in possession of land for above 50 years past; but in an action for dilapidations brought by the present against the late rector, it appearing that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 G. 2, c. 36, and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c. according to the 4th section; held that no presumption could be made of any such conveyance enrolled, (which if it existed the party might have shewn,) and consequently, that the rector had no title to the land: as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed: although in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in *Baliol College, Oxford*.

THIS was an action brought by the present rector of *St. Michael's, Colchester*, against his predecessor, to recover damages for dilapidations of the rectory-house, and other buildings described. The declaration stated, as usual, the seisin by the plaintiff of the rectory and premises, and that the latter were in a ruinous state. The defendant let judgment go by default as to the rectory-house, and pleaded not guilty as to the residue of the grievance complained of. The property in dispute, consisting originally of a dwelling-house, a stable, slaughter-house, and other premises, appeared at the trial to have been devised by one *Charles Saunders of Colchester*, by will dated 2d of August 1764, in the following words: "I give and devise all that capital messuage or dwelling-house, with the stable, slaughter-house, yards, garden, and other appurtenances, now in the occupation of me and *S. N.* unto my friends *G. Wegge, C. Gray, Esq.* and the *Rev. G. Kilby*, all of *Colchester*, their heirs and assigns for ever:" having before given an estate for life in the premises to his wife. The tenant for life and the three devisees in fee were proved to be dead. No trust was declared, nor any thing else contained in the will which could affect these premises, nor any residuary devise. But it appeared that *Kilby*, one of the devisees, was rector of this parish, and that he and all his successors, by connivance of the trustees, had let the premises to tenants for their own benefit. The advowson is in *Baliol College, Oxford*. On these facts, *Macdonald, C. B.* was inclined against the plaintiff's right to recover the damages for the dilapidation of the buildings in dispute; considering that though from the length of time that the successive rectors had been in the receipt of the rents of these premises, it would have been presumed, had nothing appeared to the contrary, that the property had been acquired to the rectory by some legal means; yet as the manner in which it had originally been acquir-

ed was shewn, it appeared that the fee was either in the heir of the surviving joint-tenant, or in the devisee or alienee of such survivor; or in the heir at law or devisee of the testator, if the devise were void as being made collusively to evade the statute of mortmain. However, the learned Judge permitted the inquiry to proceed as to the amount of these dilapidations, and a verdict was found for the plaintiff for 150*l.* the estimated amount of the dilapidation of the rectory-house; and leave was given to the plaintiff's counsel to move to add a further sum of , being the amount of the dilapidation in respect to the premises in question, if the Court should be of opinion that he was entitled to recover for those.

Nolan accordingly applied for a rule for that purpose in last *Michaelmas* term, and stated the objection made at the trial on the part of the defendant, as to the premises in dispute; that this was a void devise within the statutes of mortmain: to which it was answered that as the rectory belonged to *Baliol College*, it was within the saving of the 4th section of the stat. 9 Geo. 2, c. 36, which confirms dispositions of lands, &c. in trust for either of the two universities or the colleges thereof; for which the *Attorney-General v. Tancred*, Amb. 351, was cited. And it was contended, that as the successive rectors of the parish for above 50 years past had had possession of these premises, a conveyance, if necessary, would be presumed from the trustees to the use of the college; and that the plaintiff, the present rector, could not be supposed to be in possession of the title deeds of his patrons, so as to produce them in evidence. And he referred to *Griffin v. Stanhope*, Cro. Jac. 456, where it was said in argument, and not denied, that "if a person shew that for 200 years certain land was parcel of his glebe, it is not therefore of necessity that the other should produce a confirmation from the patron and ordinary; for the continuance of the possession makes it intendible to be according to law at the time it was made." So in *Crimes v. Smith*, 12 Rep. 4, though the original instrument of impropriation of a vicarage anno 22 Ed. 4, with condition that it should be endowed, was shewn by the defendant that it never had been endowed, and therefore the impropriation was void; yet as during all the time a vicar had been presented, admitted, instituted and inducted, as one rightfully endowed, it was resolved by all the Court that it should be presumed that the vicarage in respect of continuance was lawfully endowed.

Garrow and *Marryat* now shewed cause; and referred shortly to the learned Judge's report, as decisive of the question; the devise being absolute upon the face of it, and no proof of any conveyance enrolled having been made by the devisees or any of them to the rector and his successors, without which no title could be derived to them since the stat. 9 Geo. 2, c. 36, s. 1, and which, if it existed, the plaintiff had necessarily the means of shewing. And that in the absence of such proof, the title being shewn to be out of the rectors since the statute, no presumption could be made in their favour in express contradiction to the provisions of the act.

The Court (in the absence of Lord *Ellenborough*, who was ill) were clearly of this opinion; and *Shepherd*, Serjt., who was to have supported the rule, yielded to that opinion, without arguing the case.

Rule discharged.

Spurrier v. Vale.

10 East, 413. Jan. 24, 1809.

In debt for a penalty, under the game laws, if the defendant shew a deputation as game keeper of the manor from the lord, it may be presumed, if nothing appear to the contrary, that the game killed by him there was for the use of the lord under the stat. 8 G. 1, c. 11.

IN debt for the penalty of 5*l.* given by the stats. 3 G. 1, c. 11, and 5 & 9

Ann. for using a gun and dog for killing game, it was proved at the trial, that the defendant shot a pheasant on the 1st October 1807, in *Birchhanger* manor; that he acted as a gardner, and lived in a house belonging to Mrs. *Hiphuff*. On the part of the defendant a regular deputation was proved from *New-College* in *Oxford*, dated 28th of *March* 1806, and under their seal, appointing him their gamekeeper for *Birchhanger* manor, in the usual form, to kill game for their use. In answer to which it was objected, on the part of the plaintiff, that the defendant was not, according to the requisition of the statute, "truly and properly a servant of the lord of the manor." But the *Ld. Chief Baron*, before whom the cause was tried in *Essex*, overruled the objection; considering that if the words "truly and properly a servant" were to be construed to mean "domestic servant," corporations or individual lords of manors, having no domicile there to which their gamekeeper could be attached, would in many instances be deprived of the benefit of appointing such persons; and that the *bona fide* appointment of the defendant, as gamekeeper of a distant manor belonging to the college, satisfied the statute. It was next contended, that in order to protect the defendant, it was necessary that he should take and kill game for the sole use and immediate benefit of the lord. But supposing that to be necessary, the learned Judge was of opinion that a gamekeeper regularly appointed, proved simply to have taken or killed game, was to be presumed to have so done according to law, (especially in an action on a penal statute,) until the contrary were proved: and there being no evidence in this case, that the defendant was killing game for the use of any person other than the lord of the manor, he advised the jury to find a verdict for the defendant; which they did accordingly.

In last *Michaelmas* term it was moved to set the verdict aside on the ground of a misdirection in law; there being no evidence that the defendant who was admitted not to be qualified *suo jure*, was either "truly and properly a servant of the lord," or a person immediately employed and appointed to take and kill the game for the sole use or benefit of the lord." And the case of *Rogers v. Carter*, 2 Wils. 387. 390, was referred to; where, though it was held that a lord of a manor might appoint an unqualified person, not a menial servant of his, to kill game; yet it seemed to be understood that the deputation must be confined to killing game for the lord's own immediate use: and though such a person was held to be protected from having his gun seized even off the manor; yet it was considered that he was liable to the penalty of killing game out of the bounds of his deputation. So here, it was necessary for the defendant to shew that the game was killed for the use of the college by which he was deputed; without which he subjected himself to the penalty.

In this term *Shepherd*, Serjt. and *Burrough* were to have shewn cause against the rule; and *Garrow* and *Marryat* were heard in support of it. But

The Court (in the absence of Lord *Ellenborough*, who was ill) said that the defendant having been deputed gamekeeper by the lord of the manor, it might be presumed that the game was killed for the use of the lord, if nothing appeared in evidence to the contrary.

Rule discharged

Bowden v. Vaughan.

10 East, 415. Jan. 25, 1809.

A representation to the underwriters at the time of effecting a policy by the owner of goods on board a ship, as to the time of her sailing, being made *bona fide* upon probable expectation does not conclude him.

THIS was an action upon a policy of insurance on goods at and from *Lis-*

bon to London. Previous to the effecting of the insurance, a letter had been received by the plaintiff from his correspondent, dated *Lisbon*, 27th of October 1807, in which the writer advises him, that he had consigned to him 1828 hides by the *Almirante Nelson*, which were to be insured; stating that she was a *Portuguese* ship, and would sail in a few days. This letter was not shewn to the underwriters at the time of subscribing the policy: but the broker represented that the ship was to sail in a few days; and he said upon his examination at the trial at *Guildhall*, that if it had been represented that the ship was not to sail in less than a month, the insurance could not have been effected; the *French* army marching to the attack of *Portugal* being then daily expected at *Lisbon*. There was no doubt, therefore, of the materiality of the representation: and in fact, the vessel did not sail till the 29th of *November*, and was stopped by the enemy on the 30th, before she left the *Tagus*. Lord *Ellenborough*, C. J. left the case to the jury; advising them to consider that the person by whom the representation was made was the owner of goods, who could only speak of the sailing of the vessel from probable expectation; and that if such representation were made *bona fide*, it should not conclude him. And the jury, being of opinion that the representation had been made *bona fide* on probable expectation, found a verdict for the plaintiff.

Park now moved for a new trial, on the ground that no such distinction appeared in any of the cases, between a representation as to the time of sailing made by the owner of the goods, and one made by the ship owner; and that the effect of it with respect to the underwriter was the same, whether it proceeded from the one or the other. But

The Court were of the same opinion with the Lord Chief Justice at the trial, that a representation as to the time of the ship's sailing, made by the owner of goods on board, must, from the nature of the thing, be considered only as a probable expectation, he having no controul over the event.(1)

Rule refused.(2)

Roberston and Another v. Liddell, Bart.

10 East, 416. Jan. 25, 1809.

After verdict for the defendant, and a new trial awarded upon a question of law without any thing said as to costs; and instead of proceeding to a second trial, the parties agree to state the facts specially as if in a case reserved at the trial; on which the *postea* is afterwards delivered to the plaintiffs; they are entitled to the costs of the first trial.

THE principle point in this case having been decided with the plaintiffs in last *Easter* term, *Ante*, 9 vol. 487, a question now arose as to the costs; on which the facts were, that the defendant had obtained a verdict at the trial, and the Court afterwards granted a rule for a new trial upon the matter of law; but instead of proceeding to trial a second time, it was agreed to put the facts into the shape of a special case; which was done accordingly: and after argument, the *postea* was awarded to be delivered to the plaintiffs. And nothing having been said as to costs in the rule for the new trial, the master had taxed costs for the plaintiff, as if the special case had been originally reserved at the first trial. On which a rule *nisi* was obtained by *Hullock* for the master to revive his taxation; contending that in no event could the defendant who had obtained a verdict be liable to the costs of the first trial; for the

(1) That the question how far the circumstances concealed are material, may be left to the jury, see *Littledale & al. v. Dixon*, 1 New Rep. 151. *Livingston v. Delafield*, 1 Johns. 522.

For a reference to cases on the general subject of concealment as affecting a policy of insurance, see the editor's note to *Willes & al. v. Glover*, 1 New Rep. 14. (*Day's* edit.)

(2) [See *Alston v. Mechanics Mutual Ins. Co.* 4 Hill. 829. *Currell v. The Miss. M. & F. Ins. Co.* 9 Louis. 163. *Denniston v. Lillie*, 3 Bligh. 202.—W.]

plaintiffs could not be in a better condition than if they had succeeded upon a new trial; in which event, according to *Mason v. Skurray*, B. R. T. 20 G. 3. Hullock, 395, and *Hankey v. Smith*, 3 Term Rep. 507, they would not have been entitled to the costs of the first trial.

Carr opposed the rule. And

The Court, approved of the master's taxation; saying, that the defendant had no cause to complain; for being in the wrong, he had only the costs of one trial to pay; whereas if the cause had gone down to trial a second time, he would have had his own costs of the first trial to have paid, and all the costs of the second trial, which would have been decided against him. That if he had conceded any favour to the plaintiffs in agreeing to the special case, instead of going to trial the second time, he should have made his bargain with them about the costs at the time of such agreement.

Rule discharged.

Thomason, jointly with Hippip, Pearson, and Hodges, Assignees, under separate Commissions, of Underhill and Guest, Bankrupts, v. Frere and Others.

10 East, 418. Jan. 25, 1809.

Two of three partners, affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards by direction of such correspondent, drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners, having in the mean time committed acts of bankruptcy, indorsed such bill to the creditor of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners who were declared bankrupts, and their effects assigned; the other partner being all the time abroad. Held, 1st, that by such indorsement of the bill by the two, after acts of bankruptcy committed by them, though before the commissions issued, nothing passed to the creditor; for the bankrupt partners had by relation ceased at the time of such indorsement to have any controul over the joint stock as partners, and therefore could not bind either the property of their assignees or of their solvent partner. 2dly, That the solvent partner might join with the assignees of the other two in maintaining an action for money had and received to recover back from the creditor the amount of the bill received by him from the acceptor. 3dly, That such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs.

THOMASON, *Underhill*, and *Guest* were partners in trade at *Birmingham*; to whom the defendants, bankers at the same place, advanced money from time to time. On the 1st of *June* 1807, the balance due to the defendants was 1800*l.*, which was afterwards increased; and *Thomason*, being then resident at *Copenhagen*, where he has ever since continued, the defendants applied for security to *Underhill* and *Guest*; who thereupon by deed of that date, executed by them only, and without any authority from *Thomason*, but purporting to bind him also, assigned to the defendants certain scheduled debts due to the firm of *Thomason*, *Underhill* and *Guest*, and amongst others a debt for 1450*l.* (the sum now in dispute) from *Gamble* and *Co.* in *America*. On the 3d of *October*, 1807, *Underhill* and *Guest* received a letter of advice addressed to their firm from *Gamble* and *Co.* (who were ignorant of this assignment) desiring them to draw a bill on *Gamble* and *Co.*'s agents *Dunlop* and *Co.* in *London* for the amount of their debt of 1450*l.*; which bill was accordingly drawn at two months, and was accepted by *Dunlop* and *Co.* on the 8th of *October*, and returned to *Underhill* and *Guest* at *Birmingham*; and on the 11th, *Guest*, with the assent of *Underhill*, indorsed and delivered it over to the defendants, who had applied for it, and they received payment of it on the 6th of *December*. On the 7th of *October* 1807, *Underhill* and *Guest* committed acts of bankruptcy; on the 19th, separate commissions of bankrupt were

taken out against them; and on the 26th, they were declared bankrupts, and the plaintiffs (*Hippip, Pearson, and Hodges*) were chosen their respective assignees. And those assignees joined with *Thomason*, the remaining solvent partner, to bring this action for money had and received, in order to recover back the said sum of 1450*l.* so paid to the defendants by *Underhill* and *Guest* after their bankruptcy, by virtue of the deed of assignment executed before by those two partners for themselves and their absent partner *Thomason*. And it further appeared, that at the time of the bankruptcy, and at the trial of this cause, the partnership firm of *Thomason, Underhill, and Guest* was indebted to the defendants in a larger amount than 1450*l.* for which this action was brought. Under these circumstances, *Grose, J.*, before whom the cause was tried at *Warwick*, principally on the consideration that the partnership firm of *Thomason, Underhill, and Guest*, whose interests were represented by the respective plaintiffs, was indebted to the defendants in a larger sum than that sought to be recovered, nonsuited the plaintiffs. Whereupon a rule nisi was obtained in the last term for setting aside the nonsuit, and for a new trial.

It was now agreed on all hands, that *Underhill* and *Guest* had no authority to bind their absent partner *Thomason* by deed; (1) and that the bill having been indorsed and delivered to the defendants by the bankrupt partners, after acts of bankruptcy committed by them, would not bind their assignees, whose title would relate back, so as to affect the shares of the two bankrupts. The remaining questions were then resolved into these: first, whether the payment of a partnership debt made by the two partners after acts of bankruptcy committed by them, but before any commission issued thereon, would bind the solvent partner abroad; and if not, 2dly, whether this action brought in the joint names of the solvent partner and the assignees of the others to recover the whole could be maintained, when, as against *Thomason* at least, the defendants were entitled to retain this money; and when the firm of *Thomason, Underhill* and *Guest*, which still (it was said) remained solvent, and was represented by the several plaintiffs in this action, was now indebted to the defendants in more money than was sought to be recovered from them.

Clarke and *Reader* now opposed the rule. As to the first point; a secret act of bankruptcy, committed by one or more of several partners, however it may by relation divest the bankrupts of their property, as between them and their particular creditors, whose interests alone are regarded by the bankrupt laws, cannot operate as a dissolution of the partnership with respect to third persons dealing with the whole firm as solvent, until the public declaration of the bankruptcy by the commissioners, and their assignment of the estate and effects of the bankrupt partners. In *Smith v. Stokes*, 1 East, 363, Lord *Kenyon* said, it was not the act of bankruptcy alone (by one of two partners) that dissolved the joint tenancy, but the act of bankruptcy followed up by the commission and assignment. And therefore the indorsement and delivery of the bill in question, part of the partnership fund, made to the defendants by *Guest* and *Underhill*, before such declaration and assignment, though after acts of bankruptcy committed by them, bound *Thomason* their solvent partner; they appearing at that time in the eyes of the world as his partners, and as acting with his authority, and the creditors who dealt with them as partners having no notice of any thing done to dissolve the partnership. It is clear, that after the acts of bankruptcy committed by the two, they would have been the agents of the other for the purpose of receiving payment of a debt due to the partnership; and by the same rule they must be taken as his accredited agents to pay out of his funds that which was justly due from him to the de-

(1) Vide *Harrison v. Jackson & al.* 7 Term Rep. 207. *Gerrard v. Basse & al.* 1 Dell. 119. *Anonymous*, Tayl. 113. *Shelton v. Pollock & al.* 1 Hen. & Manf. 423. *Clement v. Brush*, 3 Johns. Ca. 180. *Green & al. v. Beale*, 2 Caines, 254., where this doctrine was recognized. It was also distinctly admitted by *Kent, Ch. J.* in *Piersons v. Hooker*, 3 Johns. 70.

fendants. 2dly, If this were a good payment with respect to *one* of the plaintiffs, they cannot recover in a joint action, in which they must establish the right of *all* to recover the whole of that which is owing to *all*. A joint action cannot be maintained by these parties without affirming and shewing that it is a *partnership* demand; and then it must be admitted, that as against the partnership the defendants have a greater demand. The joint property of the partners is liable in the first instance to their joint debts, and the assignees of the bankrupts under separate commissions have no claim but to their shares of the surplus. The firm of the three partners being in legal contemplation still solvent, (no commission having issued against *Thomason*) he has a right to have the partnership effects applied in the first instance to the discharge of the partnership joint debts; but at any rate, he cannot join in any action to recover back his own share which he was compellable to pay at the time. In *Smith v. Stokes*, 1 East, 363, joint effects of two partners had come to the defendant's hands after an act of bankruptcy committed by one of them; and it was held, that trover would not lie by the assignees of the bankrupt against the defendant who claimed under the solvent partner. The same point was ruled in *Smith v. Oriell*, 1b. 363, where the joint property, was delivered to the creditor by the solvent partner in payment of a joint debt. And in *Smith v. Goddard*, 3 Bos. & Pull. 465, the Court determined that the assignees of bankrupt partners, under a joint commission, could not recover, in an action for money had and received, money which had been paid by a clerk in the house to a joint creditor after the bankruptcy of one, and before the bankruptcy of the other partner. Then, if the payment would have been good as to the share of the partner who was solvent at the time, though he had afterwards become bankrupt, *a fortiori* if he continue solvent, it must be binding upon him. But further, the deed of assignment, though void against *Thomason*, would be binding in equity upon *Underhill* and *Guest*, who executed it before their bankruptcy; and therefore, considering the bill as indorsed afterwards by virtue of the prior assignment, the assignees of the bankrupts standing in their place cannot maintain this equitable action to recover back even their two thirds.

Vaughan, Serjt., *Rough*, Serjt., *Morice*, and *Abbott*, in support of the rule, upon the first point, argued, that the partnership was dissolved by the acts of bankruptcy committed by two of the partners, followed up by the subsequent commissions and assignments, as from the time of such acts of bankruptcy, by necessary operation of law vesting the property of the bankrupt partners in the assignees by relation back. And if the partnership were dissolved at that period, then no act done by *Underhill* and *Guest* could bind *Thomason*: but the indorsement and delivery of the bill to the defendants, made by the two partners after their bankruptcy, was the same as if done by mere strangers, both as against *Thomason* who was never bound at all by the deed, and as against their assignees who had acquired a legal right to the debt due from *Gamble* and Co. before the acceptance and delivery over of their bill to the bankrupts, and consequently before the indorsement of it to the defendants. *Gamble* and Co. were no parties to the assignment of their debt to the defendants by the two partners before their bankruptcy, and were not therefore bound even in equity by that assignment; nor could *Underhill* and *Guest* after their bankruptcy, diminish their own funds, except by such payments in the ordinary course of trade as are protected by the stat. 19 Geo. 2. c. 32, within which this cannot be ranged. All the cases cited, to which may be added *Fox v. Hanbury*, Cowp. 445, were dispositions of the joint effects made by a solvent partner. If a trader cannot dispose of his estate after an act of bankruptcy, as against his own assignees under a subsequent commission, because he was thereby divested of all property therein at the time by relation; the same reason must preclude him from disposing of the property of those who were in partnership with him, of which he must be

equally devested. 12 Mod. 446. Then, 2dly, As to the form of the action; if *Thomason* were not bound by the deed executed by his partners without his authority before the bankruptcy, nor by their indorsement and delivery of the bill after their bankruptcy to the defendants; and if the operation of the bankrupt laws be to clothe the assignees of the bankrupts with all their rights as from the time of the act of bankruptcy; the money which was due to the partnership must necessarily be considered as having been received by the defendants to the use of the solvent partner and the assignees of the other two, and consequently they may join in suing for it. In what proportion the money, when received, is to be divided, or how it is to be applied, can form no questions at law. It will certainly be applicable in the first instance, to the payment of the joint creditors, and *Thomason* will not be entitled to any part of it unless there be a surplus after those debts are satisfied. The statutes of set-off do not apply to a case of this kind, where a payment has been made by bankrupts after an act of bankruptcy; and if the defendants be not entitled to set off against all the plaintiffs, they cannot set off against any. In *Dickson v. Evans*, 6 Term Rep. 57, the defendant, in an action by the assignees of a bankrupt for a debt due to the bankrupt's estate, was not allowed to set off cash notes issued by the bankrupt payable to bearer, bearing date before the bankruptcy, without shewing that they came to his hands before that event; for afterwards the bankrupt could not bind his estate: by the same rule he cannot pass any property in a bill by indorsement after an act of bankruptcy. In *Ridout v. Brough*, Cowp. 133, it was held, that a debt due from a bankrupt before his bankruptcy could not be set off against a demand accruing in the time of the assignees: such as the receipt of money upon the bill indorsed to the defendants after the bankruptcy(a).

GROSE, J.(b). It struck me at the trial, that the defendants, to whom the firm of *Thomason, Underhill, and Guest*, represented by the several plaintiffs in this action, was indebted in more money upon the balance of accounts than was sought to be recovered against them in this action, had a right to set off their demand; but from the arguments which have been adduced I now think, that if the contrary be not established, it is at least rendered so doubtful that there ought to be a new trial in order to have the case more fully heard, and the questions, which are of consequence, more distinctly brought before the Court, either upon a special verdict, or a case reserved.

LE BLANC, J. I agree that the cause should go to a new trial. It requires further time and attention to separate the facts and the law: and if the defendants be so advised, they may apply for a special verdict. As to the form of the action I have no doubt: (1) two out of three partners commit separate acts of bankruptcy, and from that time the partnership property is by operation of law vested in the assignees of *Underhill*, and in the assignees of *Guest*, and in *Thomason* the other partner. After the acts of bankruptcy committed by *Underhill* and *Guest*, followed up as they were by commissions and assignments, they ceased to have any control or disposition over the joint-property; and therefore their indorsement of the bill to the defendants, after such acts of bankruptcy, was made by persons having no authority to dispose in that manner of the partnership fund or property; and the present plaintiffs, in whom by operation of law the whole property was vested from that time, are entitled to recover back the money received on the bill as money received to the use of *Thomason*, and of the respective assignees. And then the question

(a) Vide *Marsh v. Chambers*, 2 Stra. 1234.

(b) Lord *Ellenborough*, C. J. was indisposed, and absent.

(1) Vide *Eckhardt & al. v. Wilson*, 8 Term Rep. 142. 1 Chitty, Plead. 15. As to the question, Whether the assignees of a foreign bankrupt can join with a solvent partner here, or with his assignees, if a bankrupt, see *Bird, Savage & Bird v. Pierpont*, 1 Johns. 118. *Bird & al. v. Carital*, 2 Johns. 342.

is, Whether the defendants can set off a demand which they have upon the three partners to a greater amount, against the claim for this money which was received by the defendants, not to the use of those partners, but to the use of *Thomason* and of the several assignees of *Underhill* and *Guest*? It appears to me at present, that they cannot set it off; but the case should go to another trial in order to have it more solemnly considered.

BAYLEY, J. I am of the same opinion. The defendants claim to retain this money under an indorsement, by *Guest* after his bankruptcy, of this bill which was drawn before by the firm on the correspondents of *Gamble* and *Co.* for a partnership debt. And I take it now to be clear, that where one of several partners commits an act of bankruptcy, which is followed up by a commission and assignment, he has no longer any property in the partnership effects, but the property is, from the time of such act of bankruptcy, in his assignees by relation, and in the solvent partners. The case of *Hague and Others, Assignees of Anne and Isaac Scott v. Rolleston*, 4 Burr. 2174, is an express authority upon this point. There one of two partners, after an act of bankruptcy committed by him, sent to a joint creditor a bill of parcels of goods which he had just before, unknown to the creditor, deposited in a warehouse in his name, and who immediately after the act of bankruptcy took possession of and sold the goods in part payment of his demand: and the other solvent partner having afterwards become bankrupt, the assignees under a joint commission against both brought their action of trover against the creditor, and recovered the whole value of the goods; on the ground that when they were delivered by the joint trader who had committed the first act of bankruptcy, he was no longer to be considered as a partner so as to bind by his act the property of the other. So here, at the time of the indorsement of the bill *Underhill* and *Guest* had no control over the partnership effects; and the defendants could not acquire the property in the bill from those who had no control over it. That begets the second question, Whether if persons wrongfully get possession of the property of others, they can, when sued for it, set off a prior demand upon the same parties in right of whom the action is brought? That must be determined by reference to the statutes of set-off: but those only apply to cases where there are mutual debts and credits. Now, the defendants never could have sued *Thomason* and the assignees of *Underhill* and *Guest* for this debt; for their demand was against the partnership firm of *Thomason, Underhill, and Guest*. The case therefore is not within the words, nor is it within the spirit of the acts.

Rule absolute.

Doe, on the several Demises of Elizabeth Anne Cox, and J. Kay, v. Day.

10 East, 427. Jan. 24, 1809.

Under a power to demise for 21 years in possession, and not in reversion, a lease dated in fact on the 17th of February 1802, *habendum* from the 25th of March next ensuing the date thereof, is good if not executed and delivered till after the 25th of March, for it then takes effect as a lease in possession with reference back to the date actually expressed.

THIS was an ejectment, tried before *Lawrence, J.* at *Gloucester*, to recover certain freehold and leasehold lands in the parishes of *Rodmorton* and *Supperton*, which the defendant claimed under a lease made by *Charles Wesley Cox*, deceased, the father of *E. A. Cox*, who was entitled to recover the freehold, and *Kay*, her trustee, the leasehold, if the lease made by her father were not good.

By indentures of lease and release of the 8th and 9th of July 1790, in pursuance of an agreement made previous to the marriage of *C. W. Cox* and *Anne* his wife, the freehold premises were limited to *Charles Cox*, the father,

for life, remainder to *C. W. Cox*, the son, for life, remainder to his first and other sons in tail, remainder to his daughters in tail; with a power for the tenants for life to demise the premises for any term not exceeding 21 years in possession, and not in reversion, or by way of future use. And the leasehold, which was held under one of the prebendaries of *Salisbury*, was conveyed to trustees, on trust to permit the tenants for lives to receive the rents, and at their request to make underleases of the premises in like manner. *Charles Cox* being dead a lease was drawn, dated the 17th of February 1802, purporting to be a demise from *C. W. Cox* to the defendant of the freehold and leasehold in question, *habendum from the 25th of March next ensuing the date hereof*, for 21 years, at the yearly rent of 800*l.*: but in consequence of some difference between *C. W. Cox* and the defendant, the lease was not executed by *C. W. Cox* till the 27th of April 1802. Whereupon the learned Judge directed the jury to find a verdict for the plaintiff for the whole of the premises, with liberty for the defendant to move the Court to confine the execution to the leasehold premises in case they should be of opinion that the lease, as to the freehold, did not take effect in reversion, or by way of future use; thinking that, as to the leasehold, the defendant had no right at law, inasmuch as at the time of making the demise the legal estate was not in *C. W. Cox*, but in his trustees.

Abbott accordingly moved in last *Michaelmas* term to have the verdict for the plaintiff entered for the premises included in the prebendal lease only; on the ground that the lease of the freehold only took effect from the execution and delivery of the deed; which being after the 25th of March 1802, to which the *habendum* referred, the demise would operate from a day then past, and not in reversion or by way of future use: and that the words of the *habendum*, "from the 25th of March next ensuing the date hereof," would refer to the actual date before mentioned, namely, the 17th of February 1802, and not to the day of the delivery. The inrolment of a bargain and sale under the stat. 27 H. 8. c. 16. within six months is reckoned from the date, and not from the delivery of the deed. *Shep. Touch.* 221. And though, says Lord Coke, 2 Inst. 674, where the indenture has a date, and is delivered after, it shall take effect to pass from the bargainer from the delivery; for then it became his deed; and not from the date; yet the deed must be inrolled within six months after the date. And in *Butler v. Fincher*, 2 Bulstr. 306, he said that if the lease (which was of a freehold *habendum* from the day of the date) had been delivered after the first day, it would clearly have been good. Then in *Clayton's* case, 5 Rep. 1, the distinction was taken between a demise from henceforth, which refers to the delivery of the indenture, and from the date, or day of the date, which shall be taken to be the actual date. And *Hedley v. Joans*, Dy. 307. a., makes the same distinction between a release of all demands until the making of the release, and until the date thereof.

Williams, Serjt., *Puller*, and *Hall*, now opposed the rule. This is a lease under a power to demise in possession, and not in reversion; which is to be construed strictly; and here the lease upon the face of it purports to grant a future interest. It is no answer to say, that the deed not having been executed till after the 25th of March 1802, it did not take effect before; for if the day of the delivery be considered in law as the true date, the lease would still be reversionary, as the *habendum* from the 25th of March next ensuing the date would then refer to the 25th of March 1803. [*Le Blanc*, J. That is assuming that the day of the date and the day of the execution of the lease mean the same thing.] It does not say from the day of the date, but from the date. The date of the deed is quite immaterial; it takes its effect only from the delivery. In *Pugh v. The Duke of Leeds*, Cowp. 720, Lord Mansfield said, that the date of a deed means the day of its delivery. So in *Goddard's* case, 2 Rep. 5. And if the date be to be reckoned from the delivery for one purpose, it cannot be reckoned from a different time for another purpose. The

authorities cited by the plaintiff's counsel went upon the construction of the particular words of the statute of inrolments.

Dauncey and *Abbott*, contra, were stopped.

GROSE, J.(a) We must construe the words of the instrument, if possible, *ut res magis valeat quam pereat*, according to the rule of construction laid down in *Pugh v. The Duke of Leeds*. Therefore, though the lease took effect to pass the interest only from the delivery, which was not till after the 25th of *March* next ensuing the date, yet the period of its commencement will then have reference back to the actual date: which will cure every objection.

LE BLANC, J. This is a technical objection, in order to give effect to which we must insert in the instrument a constructive date, which will avoid it, in the place of an express date of the 25th of *March* 1802, the retaining of which will make it good with reference to the time of the actual execution of the lease on the 27th of *April* in the same year: but to put such a construction upon it would be contrary to all the authorities.

BAYLEY, J. agreed; and added, that what was said by Lord *Mansfield* in *Pugh v. The Duke of Leeds* was with reference to a case where the deed was delivered on the day of the date.

Rule absolute.

Knill v. Williams.

10 East, 481. Jan. 26, 1806.

A promissory note for 100*l.* payable to the plaintiff or order, and originally expressed to be for value received generally, being altered the next day upon the suggestion of one of the parties by the addition of the words *for the good will of the lease and trade of Mr. F. K. deceased*, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake.

THE plaintiff declared on a promissory note, dated *Hereford* 1st *April* 1807, by which nine months after date the defendant promised to pay to the plaintiff, or order, 100*l.* for value received *for the good will of the lease and trade of Mr. F. Knill deceased*; and also on the common counts. At the trial before *Le Blanc, J.* at *Hereford*, a stamped note was offered in evidence, corresponding in its terms with the note in the form declared on: but it appeared on the examination of the subscribing witness to the note, that the words in italics were added by consent of both parties the day after the note, the body of which was drawn by the witness, had been signed and delivered by the defendant to the plaintiff, without a new stamp; and that the witness who had drawn the note the day before in the presence and under the direction of both parties, was not instructed to insert those words at the time. Nor was there any evidence in the cause, from whence, (as the learned Judge observed when the matter was moved in this court,) it could have been left to the jury to collect, that it was the intention of the parties, at the same time when the note was drawn, to have those words inserted: he therefore rejected the evidence; but allowed the plaintiff to go on with his case to see whether he could support his claim independent of the note; but he could not. And the defendant was also allowed to try whether he could impeach the consideration of the note: but he failed in that. So that the question was at last reduced to the validity of the note, whether receivable or not in evidence: on which the plaintiff was nonsuited, with liberty to move to set aside the nonsuit, and by consent to enter a verdict for the plaintiff for the amount of the note,

(a) Lord *Ellenborough* was absent from indisposition.

if the Court should be of opinion that the note was receivable in evidence. This was accordingly moved in last *Michaelmas* term, and a rule granted for that purpose ; against which

Dauncey and *Puller* now shewed cause, and contended that the additional words were material, because they confined the consideration for the note to the *good will and trade* of F. Knill ; and it would have been a defence to have shewn that no such consideration was given : and that if the addition were material, it avoided the note in its original state ; and the former stamp having done its office, there ought to have been a new stamp as for a new note : for which they cited *Master v. Miller*, 4 Term Rep. 320, 5 Term Rep. 367 and 2 H. Blac. 141, *Bowman v. Nihcol*, 5 Term Rep. 537, and *Cardwell v. Martin*, 9 East, 190, and 1 Camp. N. P. Cas. 79. And they distinguished this from *Kershaw v. Cox*, 3 Esp. N. P. Cas. 246, where a bill had been drawn by *Collier* on the 1st of *August* in favour of the defendant, who indorsed it to *Kershaw*, by whom it was returned to the defendant on the 2d, upon discovering that the words, " or order," were wanting ; so that the bill could not be negotiated by indorsement ; and the defendant referred the plaintiff to *Collier*, by whom the words were inserted on the 2d of *August*, and the bill returned to the plaintiff ; and on the bill being afterwards refused acceptance, the defendant, on notice of that fact, insisted that it was a good bill and would be paid. There *Le Blanc, J.* left it to the jury upon the fact of the defendant's having immediately indorsed over the bill, and the other circumstances of the case, whether it were not the original intention of the parties to the bill to make it payable to *Cox or order*, and whether those words had not been at first omitted by mere mistake : which mistake was corrected as soon as it was discovered : and upon that ground the verdict passed. At any rate, they said, the plaintiff ought to have declared on the note in its original state, and could not recover on the count stating it as a note drawn with the additional words.

Abbott and *Lord*, in support of the rule said, that the only question was, whether the note were receivable in evidence ; for if the alteration were immaterial, so as not to affect its validity, it being stated to be *for value received*, the plaintiff would be entitled to recover upon one or other of the counts. They then insisted, that the alteration did not vary the legal effect of the note, but merely introduced the original consideration for which the note had been given ; and therefore brought the case within the principle of *Kershaw v. Cox*, which was a stronger case than this, because there the alteration varied the legal effect of the instrument. If the stamp acts be not in the way, no question can be made here as to the validity of the note between the parties on account of the alteration, which was made by their consent and in conformity to the truth of the case ; and no objection has ever been allowed upon the stamp acts, unless the alteration has been such as to give the note or bill a new operation in some material respect, such as the date, the parties, the sum, or time of payment, making it in effect a different instrument. [Lord *Ellenborough, C. J.* In *Kershaw v. Cox* the addition was allowed, because there was evidence that the added words were originally intended to have been inserted, and were omitted at the time by mere mistake ; but here there was no evidence that the consideration for the note, though truly stated, was originally intended by the parties to have been inserted. *Le Blanc, J.* The witness who was employed to draw the note said, that it was mentioned in conversation between the parties at the time what the note was given for : but he had no direction to draw the note in that form ; but he was to draw it in the common way.] It was left to his discretion to draw the note in the form he thought best ; but when the attention of the parties was drawn to the form of it the next day, the witness was desired by them to add those words ; which words described the consideration admitted by the witness to have been spoken of the day before. This was therefore sufficient evidence to have been

left to the jury to find that such had been the original intention of the parties. [*Le Blanc, J.* It appeared clearly that the addition of the words the next day was an after-thought of one of the parties.]

LORD ELLENBOROUGH, C. J. The first inclination of one's mind is always to support an instrument where the transaction is fair; but when we find so material an alteration as this, made after the instrument has been issued, I do not know where we should stop if this could be sustained. If a bond, for example, were conditioned for the payment of money generally, could it afterwards be introduced by way of recital that the money had been advanced out of a particular fund; which might afterwards be made use of as evidence for other purposes. Now here the defendant *Williams* was originally liable on the note for *value received* generally, without specifying in what that value consisted; and the effect of the alteration is to narrow the value from value received in general to the value expressed; which I cannot say is not a material alteration. And this is not like the case of *Kershaw v. Cox*, where by mistake, as it appeared, the bill had not been drawn according to the intention of the parties at the time, and which was brought back the next day to the drawer to have the imperfect execution of it perfected. But this is a case where the note was originally drawn in the manner then agreed upon; and it afterwards occurred to one of the parties that the particular account on which the note had been given should be inserted in it: and which was done the next day according to his desire. This he might have required as evidence for him against the other party of the true consideration of the note: or if he wished to restrain its circulation at large, to put it upon those who took it to inquire whether that consideration had existed. The alteration was made on the following day; and if it might have been done then, there is no reason why it might not be done at any subsequent time: and if in this instance, it may be done in other instances. Such an alteration therefore cannot be admitted without a new stamp.

GROSE, J. The question is, whether the alteration introduced made it a different note: if it be material, it is a different note: and it certainly is material; for it points out the good will and trade of *F. Knill* as the particular consideration for the note, and puts the holder upon inquiring whether that consideration had passed. The objection may press hard on the plaintiff, and one cannot but be sorry that the justice of the case as between these parties is defeated: but the very alteration shews that the parties themselves were not satisfied with the note in its original and general form, but the particular consideration was required to be pointed out. This made it another note, and required a new stamp; for want of which, it could not be received in evidence.

LE BLANC, J. If I had thought that there was any evidence on which the jury might have found that the words afterwards added had been originally intended to have been inserted, and were omitted by mistake, I should certainly have left it to them so to find: the case of *Kershaw v. Cox*, being then perfectly fresh in my mind: but according to my recollection of the evidence, it was impossible for them to draw that conclusion from it. The opinion which I delivered in *Kershaw v. Cox* can only be supported on the ground that the alteration there made in the bill the day after it was negotiated was merely the correction of a mistake made by the drawer of it, in having omitted the words "*or order*," which it was intended at the time should be inserted: for the alteration there made was a very material one. But there was strong evidence in that case to shew that the omission of those words was by mistake; for it was intended to be a negotiable note, and was immediately afterwards indorsed as such; considering that it had been drawn payable to order; and as soon as the omission was discovered it was rectified by the proper parties. Here the alteration was plainly an after-thought: and then it brings it to the question whether it be a material alteration; of which there is no doubt, for

the reasons which have been assigned by my Lord and my brother. Then being a material alteration; and one made upon a subsequent agreement the next day, there ought to have been a new stamp.

BAYLEY, J. The case of *Master v. Miller* decided that an alteration in a material part of a bill after it has issued makes a new stamp necessary: and this was a material alteration; for it was evidence of a fact, which if necessary to be inquired into, must otherwise have been proved by different evidence.

Rule discharged.

Doe, on the Demise of Thomas Thorley, v. Thomas Thorley the Elder, and Booth.

10 East, 438. Jan. 27, 1809.

One devises all his freehold estate to his wife during her natural life, "and also at her disposal" afterwards to leave it to whom she pleases: held that this only gave her a power to leave it by will; and therefore that a disposition of it by feoffment in her lifetime was void.

IN ejectment for a messuage and seven acres of land in the parish of *Dilhorn* in *Staffordshire*, the lessor of the plaintiff claimed as grandson and heir at law of *John Thorley*, who died about 21 years ago, having first made his will, dated the 18th of *November 1786*, whereby he devised to his wife *Mary Thorley* "all his personal estate, and likewise all his freehold estate, during her natural life, and also at her disposal AFTERWARDS to LEAVE it to whomsoever she pleased;" and made her sole executrix. The defendants claimed under a feoffment from the said *Mary Thorley*, who is since dead, made on the 28th of *May 1787*, after the death of her husband; whereby, in consideration of 20*l.*, she conveyed to her second son *Thomas Thorley*, the defendant, a house built by him upon some of the land comprehended in her husband's will; and afterwards made her will, dated the 11th of *July 1789*, in these words: "I leave to my daughter *Mary Thorley* all my freehold and personal estate, goods and chattels, and all that I have, for her natural life; and at her death, I leave to my son *Thomas Thorley* the house and ground which I now am possessed of for the care and management of my daughter *Mary Thorley*: and in case my son *Thomas* should die before my daughter *Mary*, then his eldest son *John Thorley* to take the care and management of the same. I leave to my son *John* and to my grandson *Thomas Thorley* 1*s.* to be paid by my son *Thomas Thorley*. Likewise I desire my son *Thomas Thorley* to pay all my debts and funeral expences at my death; and I appoint *R. Willock* and *J. Dann* my executors." *Mary Thorley* the mother and her daughter *Mary* are both dead. The house mentioned in the will of *Mary Thorley* was part of the premises contained in the will of her husband. And it was contended at the trial before *Lawrence, J.* at *Stafford*, that the defendant was not entitled to the house conveyed by the feoffment, inasmuch as *Mary Thorley* had no power to dispose of the lands left her by her husband in any way but by her will, and not by any instrument to operate in her lifetime; and the learned Judge was of that opinion: thinking that the word "leave" pointed at a testamentary disposition. And as to the other house mentioned in *Mary Thorley's* will, it was contended that her will was not to be taken as an execution of the power, as it did not refer to the power; but the learned Judge thought otherwise; and directed the jury to find their verdict for the plaintiff as to the premises mentioned in the feoffment; giving the defendant liberty to move to enter a nonsuit if the Court should be of opinion that the feoffment was a good execution of the power: for which the defendant's counsel relied on *Tomlinson v. Deighton*, 1 P.

Wms. 149 and S. C. 10. Mod. 31, where one devised land to his wife for her life, and then to be at her disposal to any of his children : and a conveyance made by the wife (and her second husband) by lease and release and fine to a trustee in fee, to the use of herself for life, remainder to her daughter in tail, remainder to her son in fee, was adjudged a good execution of the power. And on 3 Leon. 71. there cited : where the devise was to the wife for life, "and after her decease she to give the same to whom she would : " and this power also was held to be well executed by a grant of the reversion in her lifetime. And these cases were again mentioned when the rule for entering a nonsuit was moved for in the last term.

Abbott and Peake now shewed cause against the rule. Assuming it to be clear by all the authorities(a) that the wife took only a life estate, with a power of disposition after her death : they argued from the words of the devise that such power could only be executed by will : such being the natural meaning of the word *leave*, as applied to the subject-matter, especially when coupled with the express estate given to her for life, and that the property should be at her disposal afterwards. In *Tomlinson v. Dighton* the estate was placed in more general terms at the widow's disposal ; and therefore included a disposition by deed as well as by will ; and the word *then* only marked the time when the disposition was to take effect ; i. e. after her life estate ; but not the manner in which the power was to be executed ; as the word *leave* does in this case. Then if the power were meant to be executed by will, it is clear that it could not be executed by deed. By restraining his widow from disposing of the estate otherwise than by her will, the testator meant, as Lord *Eldon* observed in *Reid v. Shergold*, 10 Ves. jun. 370, to protect her against her own act : for a will being in its nature revocable to the end of her life, she could not bind herself by any previous disposition of the estate : but must continue to the last to retain that influence over the several objects of her bounty, which it was intended to give her : whereas if the power were executed by deed, it could only be revoked by reserving an express power of revocation, *Hele v. Bond*, Prec. in Chan. 474. and 1 Eq. Cas. Abr. 342. and *Hatcher v. Curtis*, 2 Freem. 61. 2dly, Supposing the power not to be confined to a disposition by will, they argued that at any rate it could not be executed by a feoffment, which by passing a fee in præsenti destroyed her own life estate to which the power was annexed ; for then it was no execution of a power by a person having an estate for life to dispose of the estate after her death. In *Tomlinson v. Dighton*, the execution of the power by lease and release, though admitted and declared to be irregular, was sustained, because it did not touch the widow's estate ; the first use being to the widow herself for life. And they referred to the distinction taken by Lord *Hale* in *Edwards v. Slater*, 1 Ventr. 228, between powers collateral, and such as belong to the land ; and of the latter sort, between powers appendant, and in gross. That considering this to be of the latter description, it was destroyed by the feoffment : and that this was confirmed by the same learned Judge in *King v. Melling*, 1 Ventr. 228 ; where he said, fines and feoffments do ransack the whole estate, and pass or extinguish, &c. all rights, conditions, powers, belonging to the land, as well as the land itself. And he agreed, that if the devisee to whom the power to jointure was given had only an estate for life, the recovery suffered by him would have barred it.

Dauncey and Puller, contra ; reserving the consideration of the last point, if it should be necessary, which they said had come upon them by surprize ; contended, as to the first, that the word *leave* did not necessarily restrict the execution of the power to be by will ; as it might be used in a more general sense with reference to the enjoyment of the estate after the widow's death ;

(a) They are collected by Mr. Coz, in his Notes to the Report of the case of *Tomlinson v. Dighton*, in 1 P. Wms. 149.

and there was no case which had restricted the method of executing a power by implication where it was not expressly given to be executed in a particular way. The particular mode of execution now insisted upon was as much glanced at in *Tomlinson v. Dighton* by the word "*then*" and in the case in 3 Leon. 71, by the words "*after her decease*," as here by the word *leave*; but yet the dispositions in both cases by irrevocable conveyances inter vivos were supported. The case in 3 Leon. 71, is also reported, though of an antecedent term, in 4 Leon. 41, and there the words creating the power were considered as referring to a disposition by *will*. In all these cases the substance of the power is the privilege of disposing of the estate after the death of the first taker; and such powers are to be construed liberally as to the mode of execution. Then the widow had the absolute disposal of her own life estate independent of the power, and there was nothing to restrict her from disposing of it during her own life.

LORD ELLENBOROUGH, C. J. This question arises on the construction of a power: and if by construing it *liberally* be meant that the Court should give to the party more latitude in the execution of the power than the person who created it intended to give, I entirely disclaim any such authority. If we can collect the meaning of the deviser, we will obsequiously give it effect; and more particularly, if that appears to us to be the true construction of the words be more for the benefit of the party for whose sake the power was created than that which is said to be the more liberal construction. The deviser first gives to his wife an estate for her life, and then he says, that it shall be "*at her disposal afterwards to leave to whomsoever she pleases*." In common understanding the word *leave* must be taken to apply to that sense of it in which a person making his will would naturally use it, namely, by a testamentary disposition. And this mode of disposing of the property was most for the benefit of his widow, whom he intended to benefit by confiding to her the power of disposing of his property after her death. It might have occurred to him, that if he gave her a power which was to be executed by deed in her lifetime, she would thereby divest herself of all controul over the property, and be disarmed of her power to attract respect up to the moment of her death from those who expected to be objects of her bounty: whereas by confining her to a disposition of the property by her will, which would be ambulatory until her death, it would operate more beneficially for herself by attracting respect and protection to her to the end of her life. I am not prepared to say, that this is a power so annexed to her estate that after disposing of that, she could not still have executed the power: but I found my opinion on the word *leave*, which shews that the testator meant the power to be executed by will; and differs this case from *Tomlinson v. Dighton*, where, after the life estate of the widow, the property was left *at her disposal*; and the determination that such disposition might be by deed in her lifetime violated no received sense of those words. In the case in Leonard the power conferred on the wife was after her decease to *give* the estate to whom she would: which might import something of which the party was to divest herself presently: but the word *leave* as applied to a disposition of property emphatically means *by will*.

GROSE, J. This is simply a question of intention, as to what the testator meant, after giving his widow a life estate in this property, by directing that it should be "*at her disposal afterwards to leave it to whomsoever she pleased*:" whether he meant to give her a power to pass it away by feoffment in her lifetime, or only by her will, which would retain to her the controul over it to the end of her life. It might have occurred to the testator that he was giving a power over his property to be executed by one who might be under coverture again; and therefore he might well intend to direct the disposition of it by such means as would at all events secure her controul over it in case she survived her second husband, and to the end of her life, and that she

should not be able to debar herself of this controul by any act during her life ; which would be the case if this feoffment could take effect. It was meant to protect her against her own act ; which could only be done by preventing her from disposing of the property during her life : and therefore the testator has said, that it shall be at her disposal afterwards to *leave* it to whom she would : and we can only carry his apparent intention into effect by saying that she could only *leave* it by a *testamentary act*. If the case had rested upon the words *at her disposal*, as in *Tomlinson v. Dighton*, that might as well have been by common law conveyance as by will : but the word *leave* points to a testamentary disposition only : and it is clear that the testator meant her to pass the estate by her will only, which she might revoke at any time of her life afterwards.

LE BLANC, J. I am of the same opinion. The case is clear upon the first point, and therefore it is not necessary to give an opinion on the other : though if it were necessary, there is not much difficulty in it. The property is "to be *at her disposal afterwards*." If the words had rested there, any instrument disposing of it after her death would have been within the words of the power ; according to the case of *Tomlinson v. Dighton*, and that in *Leonard*. But the words which follow, "to *leave* it," &c. controul the generality of the preceding words, and are the same as if he had said "to *leave* it *by her last will*." It is argued, that she might *leave* it as well by other instruments as by a will ; but I do not think that the word *leave* has so extended a signification ; it applies only to a disposition by will. A person may be said to *dispose* of property by deed as well as by will ; but no one is ever said to *leave* property by deed. This mode of construing the words of the power is also much more than the other in favour of the person meant to be benefitted by it : for thereby she would retain her power of disposing of it to the end of her life, and secure to herself all the time more influence and respect. The word *then* in *Tomlinson v. Dighton* could not be meant to apply to a disposition of the property after her death, but must refer to some instrument to be executed in her lifetime, and therefore only marked the period when the disposition was to take effect. The same may be said of the case in *Leonard* ; and the word *give* there used applies as well to a gift by deed as by will.

BAYLEY, J. The word *leave* as applied to the subject-matter *prima facie* means a disposition by will ; and if that be the ordinary sense of the word, we who are now to decide upon the meaning of the testator must say that he meant to use it in that sense, unless something appears to shew that he used it in a sense different from the ordinary one ; but nothing of that sort does appear. And this construction is confirmed by the consideration, that if the widow were confined to dispose of it by will, she would retain the power of disposition over it to the end of her life ; but if she might dispose of it by deed, having once conveyed it away, she would be precluded from the exercise of any further disposing power for the remainder of her life. Then, if this be a power to dispose of the property only by will, that being different from a power to dispose of it by deed, the power was ill executed, and the lessor of the plaintiff is entitled to recover(1).

Rule discharged.

(1) Vide *Shermer v. Shermer's Executors*, 1 Wash. 266.

Aubrey v. Fisher and Others.

10 East, 446. Jan. 22, 1809.

Where beech is admitted to be timber by the custom of the country the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at 20 years growth: and therefore upon an issue whether certain beech trees in the county of *Bucks*, (which after being felled had been distrained for payment of a poor's rate, to which it was contended that they were liable,) were or were not *timber*, according to the custom of the county, the inquiry is confined to the nature of the wood and the period of its growth, whether of 20 years; and no evidence can be received to qualify its character of *timber*, by shewing that it was not deemed to be such in the county, unless the tree contained 10 feet of solid wood. And the jury having found a general verdict for the plaintiff on that issue, affirming such trees of 20 years growth and upwards, though not containing 10 feet of solid wood, to be timber by the custom, and also upon another issue negating them to be *saleable underwood* within the stat. 43 Eliz. c. 2, the Court refused to grant a new trial.

IN replevin for taking so many beech poles at *Henly Hill* wood, in the parish of *Hambleton*, in the county of *Bucks*, the defendants avowed the taking under a warrant of distress granted by two justices of the peace for the county to the defendants as churchwardens and overseers of the poor of that parish; in which warrant it was recited, that the plaintiff was an occupier of certain lands in the parish, and was duly rated for the same in 6l. 12s. 9d.; for non-payment of which, on demand, the distress was granted. There was a second avowry for taking the same as a distress under the statute 43 Eliz. c. 2. The plaintiff pleaded several matters in bar. 1st, That he was the occupier of certain woodland in the parish, for which he was rated in the said sum; that the wood growing upon the said woodland consisted of *beech, oak, and ash trees*: and that according to immemorial custom in the county of *Bucks*, where the said woodland is situate, the said beech trees were and are timber: wherefore the defendants of their own wrong took the said goods, &c. 2d, That according to immemorial custom of the hundred of *Desborough* in the county of *Bucks*, in which hundred the said woodland is situated, the said beech trees were and are timber. 3d. That the said beech trees were timber according to the custom of that part of the county of *Bucks* where the said woodland is situated. 4th, That the produce of the said woodland was certain wood then growing upon the same, and which wood was not *saleable underwoods*. There were other general pleas; on all which pleas issues were taken by the replication. The cause was tried before *Heath, J.* by a special jury at the last assizes for the county of *Bucks*; and the learned Judge afterwards, upon a motion for a new trial, made his report of the evidence, in substance as follows:

It was admitted on the part of the plaintiff, that such beech trees as grew on the place in question had been usually rated: and on the part of the defendants, that by the custom of the county beech trees were timber, as oak and ash trees are. (But this latter admission was now explained by the defendants' counsel in court to have been made *sub modo*, according to the explanation of this species of timber given by their own witnesses.) For the plaintiff it was proved, by old persons used to woods and timber, that his woods at *Hambleton*, amounting to 116 acres, were stocked with oak, ash, and beech, which had been regularly cut at from 40 to 50, 60, and 70 years growth and upwards; and the woods of other persons in that part of the country, to the extent of 1300 acres, under the particular care of the witnesses examined, were under the same management. The largest trees were periodically cut, and the small ones of bad growth; but none of these latter under 60 years growth; and none of any description were ever cut so young as of 20 years growth. That beech was of very slow growth, and in 20 years would often be not larger than a

hedge stake. Oak was considered to be of the quickest growth. The whole fall of trees of the plaintiff were deemed by his several witnesses to be timber, without reference to the measurement or mode of measuring. That underwood or coppice was cut very differently from woods of this description; underwoods being cut *hand smooth* or clean off from the ground, leaving standards within certain distances; whereas in these woods the largest trees were felled, leaving the smaller ones to grow up in succession; and the plaintiff's woods were never managed as underwoods. That all young trees, ash poles as well as beech poles, were called *small timber*; and both alike (but not oak) were measured by the cast till they come to 10 feet: and then by the two casts till they come to 20 feet; and then by the half foot till they come to 30 feet; and after that by the whole foot. That the mode of measuring made no difference as to the trees being reputed timber. That some beech was used for building; others for repairs of waggons, &c. That the price of the poles varied according to their length. In buying a fall of trees altogether, there was but one price; but it was higher if the trees were selected.

On the part of the defendants, it was contended that the beech poles in question not measuring 10 feet, (which was explained to mean 10 feet solid contents of wood) though of from 40 to 60 years growth, were not *timber* by the custom of the county, and were therefore to be considered as *saleable underwoods*; and they also relied on the usage of rating such woods. And they proved by a person who had measured the plaintiff's fall of wood in question, that they were all called *beech poles*, and were from 5 to 8 feet; not one of them contained 10 feet. That there was a distinction in different parishes in the admeasurement between *beech poles* and *beech timber*. It was measured by casts up to 10 feet, and beyond that by half feet and feet: 25 feet to a load of poles, 50 feet to a load of beech timber. That if it were under 10 feet, it was no timber by the custom of the county, though it were 100 years old: and it was immaterial what was the kind of tree, or its age. That beech timber was headed off at 18 inches girth from the top. All the witnesses, however, admitted that the woods in question were managed differently from underwoods, and that they did not consider them as underwoods or coppice; but they were known by the name of beech poles, and not beech timber. That the same rule obtained with regard to ash as to beech. Part of the fall in question was sold at 19s. a load, containing 25 feet, and was used by different manufacturers for mangles, wheels, and other purposes; a great part was said to be only fit for firewood, and was so used till within these 4 years. A timber merchant in that part of the county said he had never sold any such beech poles for any except temporary buildings; but they might be used for barn floors: and he had seen very little beech measured as timber.

The learned Judge told the jury, that the only question for their determination was, Whether the plaintiff's wood were *saleable underwood*; and as all the witnesses agreed, that it was not underwood at all, and was differently managed and clearly distinguishable from underwood, they ought to find a general verdict for the plaintiff: which they accordingly did. But as this was a new question of very considerably importance in the county, he gave leave to the defendant's counsel to move for a new trial in respect of any of the issues where the question was, whether or not it was *timber*; his own opinion being that as beech was admitted to be timber in this county by the custom, as oak and ash were in the kingdom at large, the common rule of law which designates the latter to be timber at 20 years growth, without reference to its dimensions, would attach on beech trees: and the whole fall of trees in question were of that growth and upwards.

Sellon, Serjt. is the last term moved accordingly for a new trial, and denied that the admission made on the part of the defendant, or the evidence given at the trial, went to establish generally that beech was timber by the custom of

the county of *Bucks*, but only that it was timber when it measured 10 feet in the girth, when it was of growth and bulk sufficient for the purposes of buildings, in contradistinction to fire-wood, fencewood, or wood for inferior mechanical purposes; and if the trees in question, which were of less than 10 feet measurement and unfit for building, were not timber by the custom, it followed of necessity as a consequence of law, that not being timber by common law, they must be *saleable underwood*, and therefore ratable within the statute of *Elizabeth*: and in this view the bearing of the former issues upon the last was material. A rule *nisi* was granted; against which

Wilson, Dampier, Hulton, and Peckweil, now shewed cause. The material question was, whether the beech woods in question were *saleable underwoods*, in order to make them rateable to the relief of the poor within the stat. 43 Eliz. c. 2. s. 1.: and as the particular mention of *coal mines* in the same branch of the act has been held to exclude all other mines, so the mention of *saleable underwoods* only must be taken to exclude all other woods. And all the witnesses proved that these were not underwoods. This put an end to all the issues respecting saleable underwoods. Then as to the issue, whether these beech trees were timber by the custom; supposing them to be material upon this record, it was settled so long ago as Lord *Coke's* time(a), who was a *Buckinghamshire* man, that beech was timber by the custom of that county, which takes its name from that species of wood; *Buck* signifying beech. And when it is once ascertained that any particular wood is timber by the custom of the county, the general rules of law respecting timber attach upon it as a consequence of law, amongst others, that the tree assumes the denomination of timber at 20 years, 2 Inst. 643, growth, without reference to its girth. But this is an attempt to introduce a different rule as to timber in the county of *Bucks*, either with reference to the size of the tree, or the manner of measuring it, or the uses to which it is afterwards to be applied; either of which methods would beget an issue on each particular tree, whether timber or not, and lead to uncertainty and endless litigation: and Lord *Hardwicke*, in *Walton v. Tryon*(b), expressly disclaimed any reference to the use of the wood by way of ascertaining whether or not it was timber; and said that in the stat. 45 Edw. 3. the wood is particularly mentioned, and its age and growth, but not one word is said of the use; and that the opinion of all the Courts upon the construction of that statute had been, that where the tree is timber, *by law or custom*, of 20 years growth or upwards, it is exempt from tithe: and Lord *Coke*, in his comment on that statute, says, that with respect to 20 years being the age of timber, that statute was declaratory of the common law. Oak, ash, and other general timber wood may be, and often are treated as underwood, and then they are titheable and rateable as well as beech: but all the witnesses agreed, that these beech woods were not treated as underwoods, but managed quite in a different way as timber. Whether any wood therefore be *saleable underwood* or not within the stat. of *Elizabeth*, depends upon the management in cutting, and not upon the size or nature of the wood. Oak and ash are frequently managed as underwoods in *Kent*, and are cut for hop poles throughout large districts. In the poor soil of this part of *Buckinghamshire*, oak or ash would take 50 years to attain the growth sufficient to measure for timber in the way proposed by some of the witnesses.

The Attorney-General, Sellon, Serjt., Best and Frere, contra. The evidence was not that beech was timber by the custom of the county generally, but that it was timber when of a certain girth or dimensions containing 10 feet of solid contents, which made it applicable to the purposes of building. The mode of treatment in the mean time, till it arrived at that growth, cannot

(a) *Laphorne's case*, 1 Roll. Rep. 355, 2 Roll. Abr. 814, and 1 Inst. 53. a. and vide *Rez v. Minchinhampton Inhabitants*, 3 Burr. 1310.

(b) *Walton v. Tryon*, before Lord *Hardwicke* in 1751, 3 Burn's Eccl. Law, 440, 4. and 2 Gwillim, 327.

make that timber which is not such by law, nor does the custom depend upon the mode of treatment. Then if the custom be so qualified that beech of a certain size only be timber within it, until it grow to that size, it must be treated as *saleable underwood*, and rateable accordingly. But the learned Judge told the jury, that as beech might be timber by the custom of the county, he would take upon himself to say, in conformity with the rule of law respecting timber trees in general, that it became timber at 20 years growth. Whereas that which stands upon custom only must be taken with all the qualifications of the custom, and general rules of law can have no application to it beyond what is evidenced by the custom in those respects. The question therefore, *quo modo* beech was timber by the custom, ought wholly to have been left to the jury as a matter of fact upon the evidence. But when it was admitted that beech would by the custom of the county become timber when of certain growth and dimensions, the learned judge took on himself to decide by reference to the general rule of law respecting timber, that it would become such at 20 years growth. [Being asked by *Le Blanc, J.* whether it were meant to be contended that any tree, however old, if not of certain solid contents so as to make it timber, must necessarily be *saleable underwood*: they answered in the affirmative.] In *Chamber's Cyclopaedia*, *underwood* is described to be *coppice*, or *any wood not accounted timber*. The general rule as to 20 years growth of certain woods constituting them timber is altogether grounded upon the stat. 45 Ed. 3. c. 3, concerning prohibitions to suits in the spiritual court for *sylva caedua*, which speaks of "*great wood of the age of 20 years*," &c. sold to merchants, &c. which should not be titheable: yet that must have been understood of wood large enough to be applied to the purposes of timber; for in *Howes v. Cornwall*, 1 Lev. 159, and 2 Keb. 90, wood which was usually cut for firewood, though of 25 years growth or more, was held to be titheable: and *Twyden, J.* said, that it was not the leaving it a long time that made it timber. And in the late case of *The King v. The Inhabitants of Mirfield*, Ante, 219, woods which were usually felled for sale at 21 years growth were still held rateable annually throughout that period as *saleable underwoods*. [*Le Blanc, J.* In that case no question arose respecting the age of the woods, which were stated in fact to be *underwoods*, and were of 10 years growth.] A custom making the question of timber or no timber depend upon the dimensions of the tree is in its nature more certain than a rule which has reference only to its age.

LORD ELLENBOROUGH, C. J. The question is, whether certain woods were liable to be rated to the relief of the poor under the statute 43 *Elizabeth*? And that depends upon whether they ranged themselves under the description of *saleable underwoods* in the statute; for under that character or denomination only were they liable to be rated. And here a verdict has been found by the jury, under the direction of the learned Judge who tried the cause, upon the evidence of witnesses on both sides, concurring uniformly to the same conclusion, that they were not *saleable underwoods*. That finding then, without adverting to any other issues on the record, decided the action, as to the rateability of the woods and the right of taking the distress; for if they were not *saleable underwoods*, whatever else they might be appears in my present judgment of the case to be immaterial. There are, however, other issues, as to whether the particular trees in question were timber trees: which might be considered as material issues on the part of the plaintiff; for if they were of that description of trees which by the custom might become timber, it would be open to him to shew that they were of that age which privileged them as timber trees from being liable to be tithed or rated to the poor. And that might be considered as a medium of proof, that, being *timber*, they were not *saleable underwoods*. Now, the issues, whether timber or not, did not properly embrace any such questions as have been argued, whether there be any qualifications by the custom of the county of *Bucks* respecting the size or applica-

tion of the trees to make them timber; but the questions properly were, whether the trees were of that quality and age as entitled them to be considered under the denomination of *timber*, and therefore entitled to the protection belonging to timber, by law, namely, whether beech were by the custom of the county a timber tree, and whether these beech trees were of the growth of 20 years. But I am at a loss to find a *scintilla* of authority in any law book to warrant me in saying, that though oak and ash, which are timber trees every where by the general rule of the realm, become timber at 20 years growth, without any other qualification, and beech is recognised in our law books as a timber tree by the custom of the county of *Bucks*; yet that there may be a certain other qualification, depending on the quantity of its solid contents, attached to beech, which does not belong to oak or ash. If the qualification of having 10 feet of solid contents may be attached upon beech to make it timber in the county of *Bucks*, I see no reason why it may not as well be attached there upon oak and ash, which are timber by the general law of the realm. But our law books are quite silent upon the subject of any such qualification; nor is there any thing in the wording of these issues to raise the question. And if such a distinction were admitted, it would lead to great uncertainty and inconvenience. It might be different in different districts of the county of *Bucks*. In one the solid contents required to make the tree timber might be 10 feet; in another 9: in another 8. In other counties, where other trees are timber by custom, we should have the same or other distinctions starting up; not a word of which is to be found in any law book. It is laid down generally by Lord *Coke*, and supported by adjudged cases, that beech is timber by the custom of the county of *Bucks*. Then why should we not be bound to take notice of that custom so declared and established, as we take notice of the custom of gavelkind in *Kent*? And when beech is declared to be timber by the custom, it must be taken to be timber according to the rules of the common law respecting timber. Still however the material question is, whether these were saleable underwoods? In some counties, particularly in *Kent*, they are much in the habit of cutting down wood as underwood which would be most valuable timber if it were suffered to grow to the statuteable age, if I may so call it, of 20 years: but it is treated as underwood; but all the witnesses agreed that this was treated not at all like underwood. It is stated, that where the woods are managed as underwoods, all the small wood is cut down at stated periods, leaving standard trees at certain distances: whereas here they cut down the larger and leave the smaller wood: it was not therefore treated in any respect like underwood. Then as to the evidence of the qualification of the the custom contended for, what does it amount to? One witness only says, that if the tree do not contain 10 feet of solid contents, it is not timber but *underwood*: but his evidence cannot be put against the other testimony, and against the silence of the law, which is eloquence on a subject of this sort that has been so much discussed in the books.

GROSE, J. The only question is, whether this be *saleable underwood* in contradistinction to *timber*; and when we consider the evidence, and attend to what has been said upon this subject, it is impossible to doubt for a moment what it was. The trees which were felled were beech trees of more than 20 years growth: beech is timber by the custom of the county of *Bucks*; and the law books recognize it as timber there by that custom: and the evidence proves that these woods were not managed or cut as saleable underwoods, nor bought or sold as such, but as timber. Then beech being timber by the custom of the county, and these beech woods being of more than 20 years growth, and not being managed or cut as underwoods, what doubt can there be but that in this case, as well as in the case of other general timber trees, they must be considered as timber, and not as saleable underwoods. Then if this be the clear sense and law upon the subject, as it seems to be, it would be to no pur-

pose to send this cause again to trial, since there must be the same verdict again upon the same evidence. I have no doubt that by the custom it is timber; and being timber, it cannot be saleable underwood, which is the material question upon these issues.

LE BLANC, J. The question, with reference to the statute of *Elizabeth*, is, whether the wood felled, and on which a distress has been levied in respect of a poor's rate thereon, be *saleable underwood*? This is a question of fact; and considering it as such, there can be doubt; because all the witnesses agreed, that this had none of the qualities of underwood; that it was never managed or treated as such; and some of them said they would not on any account call it so: considering it therefore as an issue of fact, there can be no doubt but that the determination of the jury was warranted by the evidence. But it is now said, that that issue was in truth a conclusion of law resulting from the inquiry whether or not the trees in question were *timber* by the custom; that if they were not timber, they must necessarily be saleable underwood. And to be sure, the case, as it was stated to the learned Judge, was considerably perplexed, or rather it was presented to his mind in a very different view from that in which it is now attempted to be placed, when at the outset of the cause, it was admitted, that by the custom of the county beech is timber, and this without any modification. And though if that were incautiously admitted, without the qualification meant to be insisted on, it should not prejudice the defendant; still it led to the course which the cause took at the trial. For when it is understood and agreed on both sides, that by the custom of the particular county, where there is a scarcity of the common species of timber wood, and where the soil favours the growth of another species of wood, that other species shall be considered as timber; the only question according to the usual course observed in such cases has been upon the nature of the wood in dispute, whether of that species, and not upon the size of it; and when once that species has been considered as timber, the question is whether it shall not carry with it all the properties and consequences of timber by the general law, and not be liable to be qualified by the particular opinions of individuals in different parts of the county, as to whether it were of a size sufficient to be useful or not useful as timber. It seems, therefore, that the last issue was properly an issue of fact, and properly determined: and that even if it had gone to the jury upon the ground now contended for whether the beech trees in question were timber or not according to the custom, the verdict must upon the weight of evidence on that head have been the same way in which the jury have found upon the issue whether it were saleable underwood or not. For I agree with the learned Judge, that when once a particular wood has been determined to be timber by the custom of a county, it is to be taken to be so according to the rules of the common law in respect to timber in general; and therefore, the issue whether timber or not by the custom of the county will only let in the inquiry as to the particular species of wood, and will not let in those qualifications which were attempted to be introduced in this case.

Rule discharged.

BAYLEY, J. was trying causes at *Guildhall*.

John Toovey and Kempster Hughes Knight, an Infant, by Kempster Knight his Father and next Friend, v. John Basset, and George Basset, John Charles Lowth and Ann his Wife, Robert Huntsman and Jeronomy his Wife, Aubery Bowles Hughes, Jane Toovey, Catherine Bassett, and James Roe, and Harriett his Wife.

10 East, 460. Jan. 31, 1809.

Under a devise to the testatrix's daughter *E.* for life, remainder to her children and their heirs for ever ; but in case *E.* die without leaving any issue of her body, then to certain other grand-children by other daughters equally to be divided between them share and share alike as tenants in common : but in case of the death of either of her grand-children, *under age and without leaving any issue*, the share of him or her so dying should be for the benefit of the survivors of the respective family, &c. Held that the grand-children took a fee in their respective shares, by reason of the devise over on their dying *under age*, with an executory devise over if any of them died under 21, and without leaving issue at the time of their respective deaths ; and therefore the limitation over was not too remote.

THE Master of the Rolls sent the following case for the opinion of this Court.

Ann Michael, widow, being seised in fee of a freehold estate called *Perry Lands*, at *Shipley* and *West Grinsted* in *Sussex*, and being possessed of a leasehold estate at *Midhurst* in the same county for the remainder of a term of years unexpired, by her will dated the 13th of *December* 1786, and duly executed and attested, after stating "that she thereby disposes of her worldly estate wherewith God had been pleased to bless her as follows," devised thus : "First, I give and devise all that my messuage, lands, &c. called *Perry Lands*, in the parishes of *Shipley* and *West Grinsted*, and also all that messuage and garden in *Midhurst*, &c. unto my daughter *Elizabeth Michael*, to hold all the said several premises unto her for and during the term "of her natural life ; and in case of her marriage, for and during the term of "the natural life of her husband ; and from and after the decease of the survivor of them, my said daughter *Elizabeth* and her husband, (in case she "marries.) I give and devise the same premises unto all and every the children on the body of my said daughter *Elizabeth* by her said husband to be "begotten, and unto their heirs ; and if but one child, then unto such only "child, and to his or her heirs for ever. But in case my said daughter and "her husband die without leaving any issue of her body, then I do hereby "give and devise all the said several premises unto my grand children *John Toovey*, (son of my daughter *Jane Toovey*) *John*, *George*, and *Ann Bassett*, " (children of my daughter *Catherine*, wife of the Rev. *John Bassett*) and the "child or children with which she my said daughter *Catherine* is now pregnant, and unto *Elizabeth Mary*, *Henrietta*, *Harriet*, and *Aubery Bowles*, " (daughters and son of my daughter *Mary Hughes*) equally to be divided between them all, share and share alike, as tenants in common. But in case "of the death of either of my said grand-children *under age*, and *without leaving any lawful issue*, then it is my will, that the share or part of him, "her, or them, so dying, shall be for the benefit of the survivors of the respective family to which he, she, or they belong. And in case of the death "of my grandson *John Toovey*, *under age* and *without leaving any lawful issue*, then it is my will that his share or part of the said several premises "shall go and be divided amongst all and every of my surviving grand-children." There was no residuary devise of real estate ; but the testatrix devised all her goods, chattels, and personal estate to her daughter *Elizabeth*. The testatrix died soon after making her will ; leaving her daughter *Elizabeth* then the wife of *Richard Burley*, her daughter the defendant *Jane Toovey*.

vey widow, her daughter the defendant *Catherine Bassett*, her daughter *Mary Hughes*, and another daughter *Jeronomy Newman*, formerly *Jeronomy Michael*, spinster, (the two last of whom are since dead,) her co-heiresses at law; and also leaving the plaintiff *John Toovey*, the defendants *John Bassett*, *George Bassett*, *Ann* the wife of *John Charles Lowth*, *Elizabeth Mary*, (since deceased) the wife of *Kempster Knight*, *Henrietta Hughes*, (since deceased,) *Harriet* the wife of *James Roe*, and *Aubrey Bowles Hughes*, her eight grand-children: and soon after the testatrix's death, her daughter *Catherine Bassett* (who at the time of the will made was pregnant) was delivered of a daughter named *Jeronomy*, who is now the wife of the defendant *Robert Huntsman*. *Elizabeth Mary Knight*, one of the testatrix's grand-children, died some time ago, intestate as to her real estate, leaving the plaintiff *Kempster Hughes Knight*, an infant, her eldest son and heir at law. Soon after the death of the testatrix, *Richard Burley* and *Elizabeth* his wife entered into possession of the devised estates, and continued in possession till their respective deaths; and they died without leaving issue. *Henrietta Hughes* is lately dead, having first attained her age of 21 years, and having by her will devised her share of the devised estates to the defendant *Harriett Roe*. The question for the opinion of the Court was, what estate or interests the plaintiff *John Toovey*, and the defendants *John Bassett*, *George Bassett*, *Ann* the wife of *John Charles Lowth*, *Elizabeth Mary*, deceased, the late wife of *Kempster Knight*, *Henrietta Hughes*, deceased, *Harriet*, the wife of *James Roe*, *Jeronomy* the wife of *Robert Huntsman*, and *Aubrey Bowles Hughes*, the nine grand-children of the testatrix *Ann Michael*, took under her said will in the freehold and leasehold premises?

Gaselee for five of the grand-children, (the plaintiff *John Toovey*, and the defendants *John* and *George Bassett*, *Ann Lowth*, and *Jeronomy Huntsman*,) contended that they took, as tenants in common, a fee in the freehold, and the absolute interest in the leasehold. The introductory words shew that the testatrix did not mean to die intestate as to any part of her estate; and there is no residuary clause. It is now unnecessary to consider what estate the children of her daughter *Elizabeth* would have taken, if there had been any; (either an estate tail, or an executory devise with a remainder over;) that estate being disposed of in the event. The next limitation is to the several grandchildren by name "equally to be divided between them all, share and share alike, as tenants in common." So far that would only have given them estates for lives: but the clause which follows, directing that "in case of the death of either of my said grandchildren *under age*, and *without issue*," his or her share shall be for the benefit of the survivor of that branch of the family, &c. carries the fee: because if only a life estate had been intended to be given to each, it was immaterial whether the devisee attained the age of 21 or not: and giving the share of each over in this manner, only in the event of the party dying under 21, shews that the testatrix intended each grand-child to take a fee, if he or she attained 21. If the share of each had only been given over upon the devisee's dying *without issue*, it might have been contended that he would only take an estate tail: though where the devise over was to the heir at law, in *Robinson v. Grey*, 9 East, 1, that was held to give a fee to the antecedent takers. But even in this view the leasehold would pass absolutely. To shew that a devise over, upon the first devisee's dying under 21, would give a fee to such first devisee attaining that age, he referred to *Frogmorton v. Holyday*, 3 Burr. 1618, and *Doe v. Cundall*, 9 East, 400: and distinguished these from *Doe d. Candler v. Smith*, 7 Term Rep. 531, where an estate tail only was adjudged to the first taker, because such an estate was expressly devised to her in the first instance, and that construction best effectuated the general intent of the testator. And there too the only question made was, whether the first taker had an estate for life only or in tail, and not whether she took in tail or in fee. But here the es-

tate is given in the first instance to the grandchildren generally, and therefore there is no express declaration of the testatrix's intention to the contrary, to obstruct the legal effect of the subsequent words.

Reader argued to the same effect for *K. H. Knight*, a son of one of the grand-daughters.

Nolan argued to the same effect for *Harriet Roe*, another of the grand-daughters: and added, that if they were considered to take only estates for lives, the words, in case of the death of either, "*without leaving any lawful issue*," must be rejected altogether; and unless they take a fee, the words, in case of the death of either "*under age*," will be nugatory.

Holroyd, contra, for the two defendants *Jane Toovey* and *Cath, Bassett*, co-heiresses of the testatrix, contended that the grandchildren took only estates for lives, or at most estates tail in their original shares, and that the devise over to the survivors was too remote, as being after an indefinite failure of issue. First, they took only life estates, because an heir can only be disinherited by express words or necessary implication; and there are no such words; and no such implication can arise from the devise over; for all the cases where a devise over after a dying within age has been held to carry a fee to the first taker attaining 21, are founded upon the dictum of the reporter at the end of the case of *Purefoy v. Rogers*, 2 Saund. 388 a. But there the devise over was to the heir at law of the devisor, and the reasoning on which it is founded only applies to such a devise over. And in *Fowler v. Blackwell*, Com. Rep. 353, where the devise over was to an elder son, if the younger should die before 21, it was held not to pass a fee to the first taker. [Lord *Ellenborough*, C. J. The devise over was not to the heir at law either in *Frogmorton v. Holiday*, 3 Burr. 1618, or in *Doe v. Cundall*, 9 East, 400.] Admitted; but those cases may be distinguished from the present; for in the first, unless a fee had been given to the first taker, the testatrix would not have disposed of all her worldly estate as she professed to do. Whereas here a fee is expressly given to the children of *Elizabeth*, before the devise in question; and it is only in a particular event that the estate is given over. Here, therefore, the introductory words are satisfied without giving a fee by implication, which they were not in the other case. There too, the limitation over was only upon a dying under 21, and not also upon a dying *without issue*. There was also a charge there upon the estate; which was observed upon by the Court. [Lord *Ellenborough*. The charge was no burthen upon the devisee, but was to be paid out of the rents and profits.] The testatrix also had given a fee to one of her sons in another estate; and it did not appear to the Court, that any distinction was intended by her as to the nature of the estate devised to the other son. And in *Doe v. Cundall*, the limitation was, that if the party should die before 21, the survivor should be *heir* to the property: which shewed that the first was to take an estate of inheritance; because in the particular event of his dying under 21 the testator substituted an heir in the place of the heir who would otherwise have taken. If however it is to be implied from the devise over, that the grandchildren were to take an estate of inheritance, they will only take an estate tail, and not a fee: for this is a devise over not only upon a dying before 21, but also *without issue*; which shews that the testatrix did not intend that the estate should go over on a dying before 21 alone, but on a dying "*under 21 and without issue*:" but if the grandchildren attained 21, she meant at all events that their issue was to take; which will only give them estates tail. But if the grandchildren took a fee, the limitation over to the survivors of the shares of those who died under 21, and without leaving issue, will be too remote; being an executory devise, and not a contingent remainder; and being after an indefinite failure of issue. This differs it from the devise over in *Doe d. Candler v. Smith*, 7 Term Rep. 531, which was after a devise to one and the heirs of her body for ever as tenants in common. There, though the issue

could not take as tenants in common, if the ancestor took as tenant in tail; yet as the general intent could not otherwise be effectuated, the Court held that the ancestor took an estate tail. The general rule of construction on the words, dying without issue, has been, with respect to leasehold, to restrain them to a dying without issue at the time of the death of the preceding taker; but in the case of freehold, they have been taken to mean an indefinite failure of issue, unless there have been other words to shew an intent to confine the meaning of them(a).

Lord ELLENBOROUGH, C. J. The testatrix could not have contemplated an indefinite failure of issue at any remote period, because she only looked to a period while her grandchildren were under age. The context therefore shews that the devise over, upon a dying without leaving issue, must be confined to the time of the death of the preceding taker. Then with respect to the other question, it is enough to say, that there is no sufficient distinction between this case and those of *Frogmorton v. Holyday*, and *Doe v. Cundall*, to lead us to a different conclusion; but we are bound by these authorities to say that the grandchildren took a fee. If those cases had been cited before the Master of the Rolls, he probably would not have sent this case for our opinion.

Afterwards the following certificate was sent to his Honour:

This case has been argued before us by counsel: we have considered it, and are of opinion, that the said plaintiff *John Toovey*, and the defendants *John Bassett*, *George Bassett*, *Ann* the wife of *John Charles Louth*, *Elizabeth Mary*, deceased, the late wife of *Kempster Knight*, *Henrietta Hughes*, deceased, *Harriet*, the wife of *James Roe*, *Jeronomy*, the wife of *Robert Hunisman*, and *Aubrey Bowles Hughes*, the nine grand-children of the testatrix, *Ann Michael*, took under her said will estates in fee, as tenants in common in the said freehold premises, and an absolute interest as tenants in common in the said leasehold premises, with executory devises over, if any of them died under 21, and without leaving lawful issue at the time of their respective deaths(1).

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

Moffat and Another v. The East-India Company.

10 East, 468. Jan. 31, 1809.*

The clauses in the *East India Company's* charter-parties whereby the Company agree to allow 200*l.* per month for provisions while the ship remains in *India* or *China*, to be computed from her delivery of the Company's dispatches (if any) at the ship's "first consigned port, until she should be dispatched from her last port in *India* or *China* to return to *Europe*," is to be understood of her last consigned port; and will not include the time which elapsed after her departure from *Canton* (which was her last consigned port according to her sailing instructions,) on her return to *Europe*, from which course she was driven by stress of weather, and forced to put into *Bombay* for repairs, before she was again dispatched for *Europe*. But after the ship was ready to sail again from *Bombay*, the Company having detained her two months longer for convoy before they again dispatched her for *Europe*, they paid the 200*l.* a month for that period.

The 14*l.* covenanted to be paid by the Company to the ship owner in *England* for each passenger ordered on board the ship in *India* by the Company's agents, is payable notwithstanding the loss of the ship before her arrival in the *Thames*.

IN covenant, the declaration set out a charter-party entered into by the

(a) See the cases on this subject collected in a note of Mr. Serjt. *Williams to Purfoy v. Rogers*, 2 *Saund.* 388. c.

(1) *Vide Ray v. Enslin & al.* 2 *Mass. Rep.* 554. *Fordick & al. v. Cornell*, 1 *Johns.* 440. *Jackson d. Burhans v. Blanshan*, 3 *Johns.* 292. *Keating & ux. v. Reynolds*, 1 *Bay* 78. *Denn d. Sutton & ux. v. Wood*, *Cam. & Nor.* 202. *Dunn & ux. v. Bray*, 1 *Call*, 338. *Hill v. Burrow*, 3 *Call*, 342. *Tate v. Tally*, 3 *Call*, 354. *Eldridge & al. v. Fisher*, 1 *Hen. and Munf.* 559.

plaintiffs, as owners of the ship *Ganges*, in the common form, dated *London*, 3d *October* 1804, whereby the plaintiffs let to freight *all* the said ship to the Company for a certain voyage in trade, and also in warfare, and on any other service whatsoever, as the Company, or any of their authorized agents, &c. should direct in writing. And it was agreed, that the ship should proceed from the *Downs* to such ports and places in the *East-Indies*, &c. or elsewhere as the Company should direct. That the master should carry out the value of 500*l.* in foreign coins, &c. for the supply of the ship's extraordinary occasions in *India*, and in her outward voyage; and if she should arrive at her first *consigned port* in the *East Indies* or *China*, then the Company's agents should supply to the master by way of impress for buying necessary provisions for the ship 200*l.* for every calendar month, and so in proportion for a less time, so long as she should remain in *India* or *China*, to be computed from the time of the delivery of the Company's dispatches at the ship's first *consigned port* in *India* or *China*, and to continue until the said ship should be despatched from her *LAST PORT* in *India* or *China* to return to Europe. And it was also agreed, that the Company or their agents should pay to the plaintiffs in *England* 14*l.* for each passenger ordered on board the said ship by any of the Company's agents from any of their settlements, &c. in the *East-Indies*. The plaintiffs then averred, that after the making the said charter-party, viz. on 24th of *April* 1805, the Company directed in writing that the ship should proceed from the *Downs* to *Madraas*, *Prince of Wales's Island*, and *China*, but did not put on board any dispatches to their president, &c. at *Madraas*, and thereby discharged the master from delivering such dispatches. That the ship accordingly sailed on her said voyage, and on 25th *Aug.* 1805, arrived at *Madraas*, being her first *consigned port* in the *East-Indies*, &c. And then the plaintiffs assigned as breaches, 1st, that though the ship remained in *India* or *China* for 20 calendar months computed from the time when the master would have delivered the Company's dispatches, if any, at *Madraas*, until the ship was afterwards on the 25th of *April* 1807, dispatched from her last port in *India* or *China*, according to the true intent and meaning of the charter-party, of which the company had notice; yet the Company or their agents, &c. did not supply the master, with the said 200*l.* for every calendar month, &c. while the ship remained in *India* or *China*, but made default therein, &c. 2dly, That after making the charter-party, viz. on the 25th of *February* 1807, divers passengers were ordered on board the said ship by the Company's agents from *Bombay*, one of the settlements in the *East Indies*, and were received and maintained on board: but neither the Company nor their agents paid to the plaintiffs the said 14*l.* for either of the said passengers, but refused so to do, &c. to the plaintiff's damage of 500*l.*

To this the defendants pleaded several pleas in bar; amongst others, 3dly, that it was further covenanted by the charter-party, that the ship, having received in her lading, and the master his dispatches, should depart from her *last lading port*, and (the dangers of the seas excepted) should sail directly and return without any deviation, other than should be ordered by the Company, or their agents abroad, to *London*, and make a due discharge into the Company's warehouses of her cargo. And that if the ship should, by written orders from the Company, be detained at *St. Helena*, or any other port to stay for convoy, they should allow demurrage of 27*l.* 1*s.* 6*d.* a day: but that they should not pay demurrage for the time the ship should take in amending any defects, except for the damage received in offensive service against the enemy, &c. But if she were detained in the Company's service beyond the 11th of *Feb.* 1807, and by reason thereof should need repair, then the company should pay demurrage at the rate aforesaid for every day she should be under repair not exceeding 30 days, &c. And it was further covenanted, that if the ship should not arrive in safety in the *Thames*, and there make a right delivery of her whole cargo, the Company should not be liable to pay any of the sums

before agreed for freight and demurrage, except as therein before mentioned ; nor subject to any demands of the owners or master on account of the said ship's earnings in freight voyages for the Company, or on account of *any other employment* : but if she arrived safely and made such delivery, then all the freight and demurrage should be paid in the manner and at the times therein set forth. And then the plea stated, that the ship remained in *India* and *China* for 7 months, computed from the time when the master would have delivered the Company's dispatches at *Madraas*, until she was afterwards dispatched to return to *Europe*, to wit, at *Canton*, the same being the last lading port of the ship according to the true intent and meaning of the charter-party. That the ship afterwards sailed to return to *Europe* pursuant to the covenants in the charter-party, and while on such voyage, without the orders of the Company or their agents, &c. returned to *Bombay*, a port in *India*, and without any such orders continued there for 5 months. And that afterwards on the 25th of *November* 1806, the governor and council of *Bombay* detained the ship there two months till convoy for *Europe* was ready to sail, and then dispatched her to return to *Europe*. And then the Company averred, that all the time in this plea mentioned, except from the time of the ship's being first dispatched to return to *Europe* until she was so detained at *Bombay*, they monthly supplied the master of the ship at the rate of 200*l.* for every calendar month, &c. by way of impress for buying provisions for the ship, according to their covenant, &c.

To this plea the plaintiff replied, that after the arrival of the ship in the *East-Indies*, and after she was laden by the Company, she was dispatched to return to *Europe*, and that afterwards while she was sailing on her voyage in that plea mentioned, and before the completion thereof, she was greatly damaged by the perils of the sea, and for the necessary preservation of the ship and cargo the master was obliged to put into *Bombay*, and to remain there for the repair of the ship for ten months then next ensuing, and until the ship was detained by the governor and council of *Bombay*, as in the plea mentioned, and then was by them dispatched to return to *Europe* from *Bombay*, being the last port in *India* or *China* from whence the ship was dispatched ; which is the same time between the said ship's being first dispatched for *Europe* until she was detained at *Bombay* aforesaid in that plea mentioned &c. To this there was a general demurrer.

The defendants further pleaded, 5thly, that it was also covenanted by the charter-party as in the third plea mentioned ; and that the ship after being dispatched from her last port in *India* or *China*, as in the declaration mentioned, to wit, from *Bombay*, and before her arrival in the *Thames*, to wit, on the 1st of *March* 1807, was lost by the perils of the sea ; and that though divers goods of great value were laden on board the ship at *Canton* in *China*, yet she has not made a right delivery thereof according to the charter-party, &c. There were several other pleas similar in substance ; to all which the plaintiffs demurred generally.

W. Adam, for the plaintiffs, stated the first question on the demurrer to the replication to the 3d plea, to be, whether the Company were bound to advance the 200*l.* per month to the master of the ship in *India* for the time which elapsed from the ship's being dispatched from *Canton* to her detention by the governor and council of *Bombay* ; in other words, whether the computation of the time for which the 200*l.* per month is to be paid, which is expressed to be from the ship's "first consigned port in *India* or *China*, until she should be despatched from her last port in *India* or *China* to return to *Europe*," must be understood of her "last consigned port" from which she is dispatched to return to *Europe* ; or simply, of her "last port" at which she shall have lawfully touched in *India* or *China* before her actual return to *Europe*. He contended for the latter, as being the plain meaning of the words used, to which the Court were bound to give effect, unless it manifestly appeared to be the intent of the contracting parties to use those general words in a more limited sense ; the

contrary of which, he argued, was to be collected from the change of expression in the same sentence: and also from the reason of the reservation, which applied as well to a detention for necessary repairs in any of the Company's ports in *India*, into which the ship was driven by stress of weather, as in a consigned port. 2dly, Upon the demurrer to the 5th plea, he argued that the plaintiffs were at all events entitled to recover for the 14*l.* a head for the passengers ordered on board in *India*, although the ship was lost before her arrival in the *Thames*. This allowance was not to be paid in the nature of freight; for the company had before hired the whole ship to freight; but for the extra expence incurred by the Captain in laying in provisions and other necessaries for the use of the passengers; which expence was incurred in the first instance, and did not depend upon the subsequent safe arrival or loss of the vessel in the course of the voyage. It would be the same thing though the passengers had died in the course of the voyage.

Bosanquet, contra, observed on the last point; (the Court having intimated that they had no doubt on the first;) that the 14*l.* for each passenger was covenanted to be paid by the company in *England*; by which it seemed that the arrival of the ship with her passengers in *England* was a condition precedent to the payment of the money, following the general nature of freight, to which such a covenant appertained. And it is expressly stipulated, that if the ship should not arrive in safety in the *Thames*, &c. the Company shall not be liable to pay any of the sums specified for freight and demurrage, nor be subject to any demands of the owners or master on account of *any other employment*. Now this was an *employment* of the ship; and it cannot make any difference whether the ship be employed in the Company's service in carrying passengers or goods: if there be more passengers there must be fewer goods; and this is only an extra allowance of freight, which must be governed by the general rule respecting freight. It is not said that the 14*l.* is to be paid for providing maintenance for the passengers. [*Le Blanc*, J. asked, if the owners did not victual the ship: which was answered in the affirmative.]

LORD ELLENBOROUGH, C. J. As to the first point; the payment of the 200*l.* per month is limited to cease at the time when the ship shall be *despatched* from her last port to return to *Europe*; and *Canton*, which was her last consigned port, was properly her last port for the purpose of being *despatched to return to Europe*, within the meaning of the contract. But as to the demand for the 14*l.* for each passenger ordered on board, the plaintiffs are entitled to recover. An extra expence is incurred by the owners in laying in a stock for the necessary subsistence of the persons ordered on board by the Company's agents: and to reimburse this charge the payment is to be made at home. And I do not think that this demand is repelled by the stipulation referred to in the charter-party, that if the ship shall not arrive in safety in the *Thames*, &c. the company shall not be liable for the freight and demurrage agreed on, or for any demands on account of the ship's earnings in freight voyages for the company; or on account of *any other employment*: for construing the latter words according to the context, it means the *employment* of the ship in any other voyage or adventure: and we know that the Company reserve to themselves the power of employing their chartered ships on other accounts than trading voyages, as in warfare. The putting these passengers on board does not alter the employment of the ship as to her destination: they must go wherever the ship would otherwise be ordered to proceed, if they were not on board. This claim therefore is not repelled by the loss of the ship before her arrival.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. As to the first point; the "*last port*" of the ship must be understood to refer to her last port in the course of the voyage directed under the charter-party: which was to *Madras, Prince of Wales's Island, and Chi-*

na; and *Canton* was her last port in *China*, from whence she was dispatched on her return to Europe. As to the second point; the 14*l.* is to be paid in *England* for each passenger ordered on board the ship; not for each passenger who should be brought to *England*: and it was meant to be a compensation for providing diet and accommodation for the passengers, which expence would at all events be incurred whether the ship arrived or were lost.

BAYLEY, J. The quantity of provisions must be provided in the first instance in proportion to the number of passengers put on board by the orders of the Company's agents. The owners therefore ought not in justice to sustain the loss.

Judgment for the plaintiffs on the demurrers to the 5th and subsequent like pleas; and for the defendants on the rest.

Hill v. Smith.

10 East, 476. Jan. 31, 1809.

Where the corporation of *Worcester* had for above forty years received toll upon corn sold in their market by sample, and afterwards brought within the city to be delivered to the buyer; and for about sixty years back, as far as living memory went, when corn pitched in the market place on one market day was not then sold, it was usually put in store in the city, and only one bag brought into the next market by way of sample, and when sold in that manner toll used to be taken on the whole; this was held sufficient evidence to be left to the jury of a prescriptive claim to take toll on corn sold in the market by sample, and afterwards brought into the city to be delivered to the buyer; though the witnesses spoke according to their recollection and belief of the commencement of selling by sample in the market in the manner now practised between 40 and 50 years ago.

TRESPASS for taking wheat and other grain of the plaintiff, at *Droitwich* in the county of *Worcester*, and converting the same to the defendant's use. To which the defendant, in addition to the general issue, pleaded several special justifications. 1. As to taking 30 pints of wheat, part, &c.; that the city of *Worcester* is an ancient borough or city, and the citizens or burgesses have immemorially been a body corporate by different names till the charter of the 19 Jac. 1. incorporating them by the name of the mayor, aldermen, and citizens of *Worcester*; and that the said citizens or burgesses, from time immemorial until that charter, and the mayor, aldermen, and citizens since, have had and held and been used and accustomed, and of right ought, to have and hold a market in the said borough or city, in a certain place there, now called the Corn-market, on every *Saturday*, (except when *Christmas-day* happens on a *Saturday*) for the buying and selling of wheat and other grain there; and during all the time aforesaid have, at their own costs and charges, repaired the highways and pavements of the said corn market, and other highways and streets in the said borough or city, for the more convenient bringing of grain into the said borough or city to be sold there: and by reason of the premises have immemorially taken, &c. for their own use a certain reasonable toll, viz. one pint of wheat, corn measure, for every 3 bushels of wheat, reckoning the same according to the quantity sold and delivered as such in the said city or borough, sold in the said market by sample, and afterwards brought into the said borough or city to be delivered to the buyer, to be paid by the seller of such wheat, except where the seller of such wheat has been a freeman of the said city or borough, and except wheat of any person otherwise exempt by law from the payment of the said toll, and except wheat that had before paid toll in any market or fair in the said borough or city; and in case of non payment or such toll after reasonable request, &c. the corporation have immemorially

taken a reasonable distress for the same, &c. The plea then averred, that the plaintiff, on a certain market day, sold to one *T. Hull* 31 bags as for 3 bushels of wheat in each bag, by sample, to be delivered in the said city, which said wheat, of which the said 30 pints were parcel, &c. was afterwards brought to be delivered to *T. Hull*, in the said corn-market in the said city, &c. (negativ- ing its coming within any of the exemptions.) That the defendant, as servant of the corporation, requested the plaintiff, then and there having the possession of the said wheat, to pay toll for the same, being in the said market place, and within the said city; and on his refusal, took the said 30 pints, &c. for and in the name of a distress for the said toll. The 2d special plea introduced another exemption from the payment of the toll, viz. where the wheat was drawn into the city in the cart or carriage of any freeman, &c.; and stated that on payment of such toll on request, the corporation had immemorially taken the same out of the wheat so sold by sample in the said market, and afterwards brought to be delivered to the buyer in the said borough or city, and to detain the same for the said toll. The 3d special plea stated, that the city of *Worcester* was immemorially lying within and parcel of the manor of *Worcester*, of which manor the corporation, &c. have been immemorially seised, and in respect of such manor have immemorially taken and received the toll *for and in consideration of the liberty of coming*, going, and passing with corn and grain into the said borough or city, so being parcel of the said manor: and in case of non-payment have immemorially taken a reasonable distress, &c. The 4th plea stated, that the corporation have immemorially *repaired the horse and carriage road* in a certain street in the said city of *Worcester*, *called the corn-market, amongst others*; and by reason of the premises, have immemorially taken and received the said reasonable toll, viz. one pint for every 3 bushels of corn or grain by any person brought into the said borough or city over and along the said horse and carriage road, in the said street called the corn-market, to be delivered to any buyer thereof: except as before, &c.; with the same power of distress and detention in case of non-payment: and then averred that the plaintiff had brought into the said city 93 bushels of wheat over and along the said horse and carriage road to be delivered in the said city, &c. Wherefore, &c. The replication to the first special plea traversed the liability of the corporation to repair the high- ways and pavements of the corn-market, and other highways and streets in the borough or city, as stated in that plea, and that by reason thereof they have been entitled to take the toll therein claimed: and the like traverse was taken on the second plea in respect of the claim of toll there stated. The replication to the 3d plea traversed the right of toll therein claimed in respect of the seisin of the manor of *W.* in consideration of the liberty of going with corn into the said borough or city, as claimed in that plea. And the replica- tion to the 4th plea traversed the liability of the corporation to repair the horse and carriage road in the street called the Corn-market, among others, and their right in respect thereof to the toll claimed. On all these traverses issues were taken.

At the trial of the cause before *Le Blanc, J.* at *Worcester*, it appeared, that the corporation had immemorially repaired the pavements of the corn-market and some of the streets in the city, but not all of them: and no question was made but that they were immemorially entitled to and had always received the toll claimed in respect to all corn brought in bulk into the corn-market and sold there. And they had also received toll of all corn sold in the market by sample, and afterwards brought into the city to be delivered since the practice of selling by sample had prevailed. And the only question was, whether they had a prescriptive claim to the toll for corn sold by sample in the market, and afterwards delivered within the city; in which manner the corn, for the toll of which the distress in question had been taken, had been sold and delivered; the sample having been exhibited in the market by the plaintiff, the seller,

in a small bag, at the time of the sale, before any part of the commodity in bulk had been brought into the city, but which was afterwards delivered in the market place within the city. Of the precise time when this mode of selling by sample in *small bags* originated no certain evidence was given, but probably about 40 years ago, as it appeared upon the whole of the evidence. The general evidence as to the mode of selling corn in this market went back to about 60 years ago, at which time some of the witnesses first recollected attending the weekly markets. The corn was then brought in bulk on horseback and in carriages, for the most part in bags, and was pitched in the market-place. Sometimes a single bag was so pitched, and the rest were left at hand in the waggon in which they had been brought there. But as far back as living memory went, if the corn so deposited in bulk, or part pitched and the rest left in the waggon on one market day, was not then sold, instead of being taken home again by the owner, it was commonly deposited in some warehouse or inn within the city till the next market day, when a single bag of it would be brought and pitched in the market-place to serve as a sample of the quality of the rest of it; and when sold in that manner toll was paid for the whole quantity sold, the same as if the whole had been then pitched in the market. One old witness spoke of sales by sample in the market (*i. e.* sales by sample in small bags without any previous pitching of the bulk in the market-place) having began according to his recollection about the years 1764 or 1766, and that soon after they became very general. It was objected, on the part of the plaintiff, that this evidence (the substance of which only is here given) did not prove, but negatived, the prescriptive claim of the corporation for toll upon a sale by sample, such as had been made in the present case. But *Le Blanc, J.* told the jury, that the exercise of the right of taking toll for corn sold by sample for so many years back was evidence of the grant of such a toll to the corporation before time of memory: and that though the practice of selling corn by sample in small bags, without any previous pitching of the bulk of the commodity in the market-place, appeared to have grown up in modern times; yet as it appeared, that as far back as between 1740 and 1750, to which the evidence went, corn which had been pitched in the market-place on one market day, and not then sold, had paid toll upon the sale of it on a future day, when the bulk of it had been removed and lodged elsewhere in the city, and only a small part, as one bag, brought into the market, which was exhibited as a sample of the rest; he thought this was evidence for the jury to decide upon, whether the prescriptive grant of toll to the corporation did not include sale by sample, as laid in the defendant's first special plea; and the jury accordingly found a verdict for the defendant on the first special issue.

In last *Michaelmas* term, *Williams, Serjt.* moved for a new trial, upon the alleged ground of the misdirection of the learned Judge, in having left it to the jury upon the facts in evidence to presume a prescriptive grant of toll to the corporation upon all corn sold by sample, as well as in bulk, when the practice of selling by sample at all, in the sense in which sales by sample are now understood, was proved to have originated within living memory. And the Court granted a rule to shew cause, in order to have the question, which was of extensive consequence, more fully discussed. And in this term

The Attorney-General, Dauncey, Wigley, and Puller, shewed cause against the rule. A right which has been exercised for between 40 and 50 years past may be presumed to have been exercised immemorially, and consequently may be presumed to have been originally granted, where a good consideration may be shewn for such a grant. It was proved, that as far back as 1764, toll had been taken on corn sold in the market by sample in the present manner; and though the witnesses remembered no instances of such sales by sample prior to that period, which nearly reached the extent of living memory, it did not follow, that no corn was sold in that manner before; but the jury might

well presume that the practice, which rapidly grew up from about that period, was warranted by more ancient precedents, though not so general as afterwards prevailed; and the knowledge of such more ancient precedents at that period might have been the reason why the practice, which then began to prevail more generally, was submitted to for so long a time afterwards. And the acknowledged practice of selling large quantities of corn by samples of single bags alone brought into the market at the time of sale, which had prevailed as far back as living memory went, is a strong confirmation of the presumption made by the jury of a prescriptive grant of toll on all corn sold in the market by sample generally, where the bulk of it is afterwards delivered within the city. It cannot make any difference in principle, whether the sale of the bulk be made by a larger or smaller bag brought into the market at the time. Then, if this were evidence of such a prescriptive grant to the corporation, their providing the public with a market-place upon their own soil, and the obligation on them to pave and keep in repair that and other streets of the city, over which the corn might pass in its passage, would be a sufficient consideration to sustain such a grant. [Lord *Ellenborough*, suggested a difficulty, that this was not claimed strictly as a market toll, but in respect of the use of those streets which the corporation keep in repair, and one of which is used as a market-place, and others for the more convenient bringing of grain into the market. And the delivery of the bulk might be in a street within the city which the corporation did not repair; so that the seller might only come in contact with a consideration for the toll by bringing his sample into the market place.] It is not necessary that they should repair all the streets of the city; but it must at this day be presumed, that they repair all which the king at the time of the grant thought it material to require them to do. They referred to *The Mayor of Carlisle v. Wilson*, 5 East, 2, as a stronger case of presumption in favour of a toll.

Williams, Serjt., *Jervis*, Lord, *Abbott*, and *C. F. Williams*, contra. A prescriptive toll on corn sold by sample is claimed by the corporation as lords of the market, and in respect of the repair of certain streets for the more convenient bringing of the corn to the market. And though general evidence of usage for 50 or 60 years, or even for a less period, be evidence, if uncontradicted, of a prescriptive grant; yet here the evidence negated that presumption; for the beginning of the practice of selling *by sample* in the strict sense of the term, without submitting the bulk to inspection in the market, was remembered by some of the witnesses; and it was proved that 60 years ago, before that practice began, the corn was always brought in bulk to the market and pitched there. It is true, that when corn so pitched was not sold on one market day, it was used to be put in store within the city, and on the next market day only one bag would be brought into the market as a sample of the rest; and no toll was taken on the first day, because by the general rule of law the toll is only payable on the sale, 2 Inst. 221: but that does not establish the right of toll to the extent now claimed; for in those instances the bulk of the commodity had been once submitted to the inspection and correction of the market: all the public benefit was received on the one hand, and on the other the full use of the market and streets kept in repair. Whereas here no part of the commodity has ever been pitched in the market, nor any part of it within its limits, except the small sample carried in the hand of the seller: the parties therefore have not had the benefit of the whole consideration for the toll. And the distinction between the two cases is substantial, and not merely nominal, as if it had rested upon the greater or less size of the bag which was exhibited as a sample. The evidence therefore did not warrant the finding of the first special issue for the defendant. But, 2dly, the king cannot grant a toll on corn sold by sample in the market. Toll is not of common right, nor incident to a market, nor can the king grant it after a market has been once

established, without a valuable consideration(a). The nature of this consideration does not extend to toll on sales by sample, without ever bringing the bulk within the market; and unless the parties have the benefit of the consideration, the toll is not demandable of them(b). In the *Tewkesbury* case, 6 East, 461, Lord *Ellenborough*, in delivering the judgment of the Court, observes upon the essential difference between toll for corn brought in bulk into the market and sold, and such as is only sold there by sample; that in the latter case the correction of the market at the time and place of sale is wholly lost to the buyer in point of benefit; he has no benefit from the previous view of the entire bulk exposed in the marketplace; nor the advantage in reduction of price, which frequently results to the buyer from the seller's dread of being obliged to carry back his commodity in bulk unsold. It was on this ground probably, that *Powel*, J. said, in *Kirby v. Wichelow*, 2 Lutw. 1502, that the king cannot grant toll on goods not brought into the market; which opinion is recognized by Lord C. B. *Comyns*, 5 Com. Dig. 519. Toll, E. And it was considered by Lord *Kenyon*, in *Moseley v. Pearson*, 4 Term Rep. 107, that the grant of toll for all goods sold in a market, *ex vi termini* imported that the goods sold were brought into the market, and ready to be delivered to the purchaser; and that if they were sold there by sample, no toll would be demandable, but the remedy, if any, was by action on the case for selling there by sample, in fraud of the lord of the market: and such was the opinion of the Court in *Blakey v. Dinsdale*, Cowp. 661.

On the question whether a grant of toll on corn sold by sample, where the bulk was never brought into the market, were good or not, Lord *Ellenborough*, C. J. and the rest of the Court declined giving any opinion at present: his lordship saying, that the question was on the record, and might be discussed in another shape. And at present, they were only to consider whether the evidence had been properly received at the trial. Another objection was also insisted upon by the plaintiff's counsel, that the alleged consideration for the toll in the first special plea was the repair of the corn-market and other highways and streets in the city, for the more convenient bringing of the grain into the city to be sold there; but the claim of toll in this instance was for a sale, by sample, of corn afterwards brought into the city, (generally) to be delivered to the buyer; which might refer to any part of the city, and might therefore include a delivery in a part of the city which the corporation were not bound to repair; and therefore the prescription was ill laid, according to the case of *Trueman v. Walgham*, 2 Wils. 296. But the Court said, that this objection also was upon the record.

LORD ELLENBOROUGH, C. J. Without suggesting any opinion upon the questions which appear upon the record, I shall confine myself to the only question for our consideration upon the present rule, whether the evidence received at the trial were competent to be submitted to the jury in proof of the allegations contained in the first special plea. In that plea, an immemorial right of toll is claimed by the corporation for corn sold in their market by sample, and afterwards brought into the city to be delivered to the buyer. This claim is not made specifically as a claim of a market toll; because it is stated, that they have immemorially repaired a certain place in the city called the corn market, and other highways and streets in the city for the more convenient bringing of the grain to be sold there; and that by reason of the premises they have immemorially taken the toll claimed by them. This may apply to a claim of toll through, and is not confined to a mere market toll. The only question now is, whether upon this claim so stated, the jury might fairly presume from the evidence laid before them, that the corporation had a prescriptive grant of such a toll. Sales by sample must be as old as commerce itself;

(a) Ib. 220. *Heddy v. Wheelhouse*, Cro. Eliz. 558. 591, and *Moor*, 474.

(b) *Haspurt v. Wills*, 1 Vent. 71, and 1 Mod. 47, and *Prideaux v. Worne*, 2 Lev. 96.

and in the case of bulky commodities like corn, the convenience of mankind must at all times have required an exhibition of them by sample in some manner or other ; but sales by sample in a market, where the bulk of the commodity is never brought into the market at all, may be of modern introduction. If the grant were of toll on *all* sales in the market generally, that might be taken to include sales *quovis modo*, by sample or otherwise. But what is the evidence of sales by sample on which toll has been taken ? It appears that from about 1764, the practice of selling by sample in the manner now used grew to be very general ; but before that, and as long back as any witnesses could remember, there were occasional instances of sales by single bags in a subsequent market on which toll was taken, where the bulk of the commodity had been brought into the market on a prior day, and remaining there unsold had been removed into other parts of the city. Now, though that would not prove the taking of toll on sales by sample of things *afterwards* brought into the city ; yet still it would be evidence of sales *by sample*. The fact of such sales was notorious ; but whether in every instance of that kind, the bulk of the commodity had actually before been pitched in the market on a prior market day might not be so certain, though the witnesses might believe that it had ; but for above forty years back, it is agreed, that such sales had taken place without any exhibition of the commodity in bulk in the market, on which toll had been taken. Then taking the whole of this evidence together, can we say that it was not competent evidence to be left to the jury, (for that is the only question now,) to presume that the practice of taking toll on such sales had prevailed immemorially. And the jury having found in favour of the prescription as laid in the plea, I see no ground for disturbing the verdict. What the effect of such finding may be, as to the questions which arise upon the record, I give no opinion.

LE BLANC, J. I thought at the trial that the evidence was sufficient to go to the jury upon the prescription, and my opinion still remains the same.

BAYLEY, J. This was proper evidence to be left to the jury. The plaintiff had in truth all the benefit of the market and of the repair of the streets sustained by the corporation. The practice, as it now prevails, is admitted to have existed for above 40 years : and therefore the question does not rest now on the same-ground that it did in the year 1764 : for after an acquiescence for so many years by those persons who were interested in resisting the claim, if it had been considered to be unfounded at the time, the jury might with more reason presume that there did exist a like usage before that time, though not known to the particular witnesses who were examined. Former instances of this sort might have been remembered and known to the jury, that after persons had brought part of their corn into the market and sold it there, they had contracted there to sell a larger quantity of the same kind, and for which, upon its being afterwards driven through the streets and delivered in the city, toll may have been claimed. This would properly be a sale by sample, and if the claim of toll on the whole quantity had been submitted to, that would have warranted them in finding the fact of a prescriptive toll on sales by sample.

Rule discharged.

The King v. The Inhabitants of Horwick.

10 East, 489. Feb. 1, 1809.

Under a contract of hiring as a bleacher and crofter for a year at 12s. a week, the servant continuing to work under such a contract for a year gained a settlement in the parish where he resided, although by the practice of the manufactory in which he was engaged, if he finished his appointed week's work, calculated at so many pieces a day, for six days, in less time, he had the rest of the week to do as he pleased, and, he also went where he chose on *Sundays*, without asking leave: for this is an express contract for a year, without any express exception.

TWO justices by an order removed *William* and *Mary Walls*, and their children, from the township of *Horwick* to the township of *Heapy*, in the county of *Lancaster*; which order was quashed by the Sessions, on appeal, subject to the opinion of this Court on these facts.

The pauper *William Walls*, some years ago, was hired as a bleacher and crofter for a year, at the wages of 12s. a week, to serve Messrs. *Ainsworth* and *Booth*, whose works are at *Heapy*. This was all that passed at the time of hiring. He continued in such service for the year; residing in *Heapy*, but not in his masters' house; and was employed to do the general crofter's business. In these works, each bleacher is directed by his masters to get up a certain number of pieces within the week. The task set is calculated at the rate of so many pieces a day for six days. The man is not stinted to hours; if he finish his work in less than the time appointed, the rest of the time is his own, to do as he pleases; if he do more than the appointed work, he receives for overwork. Having neglected his work in the week days, the pauper has occasionally made up for his loss of time by working on *Sundays*; but this was his own act and deed. The pauper on *Sundays* went where he pleased without asking his master's leave. Messrs. *Ainsworth* and *Booth* never engaged or employed their bleachers to work on *Sundays*: they had nothing to do with them on *Sunday*. In respect of their servants, who were hired for other purposes, they were occasionally put to work on *Sundays*, but when they were so, they were allowed something for it. The Sessions were of opinion, that under these circumstances, and from the nature of the trade, the pauper was not under such controul of his masters, that he could be considered to have gained a settlement in *Heapy* under such hiring and service.

Yates, in support of the order of Sessions, contended, that this was not a hiring for a year; *Sundays* being in effect excepted out of the contract; which brought this within the former cases of *Rex v. Macclesfield*, Burr. S. C. 458, *Rex v. Kingswinford*, 4 Term Rep. 219, and *Rex v. North Nibley*, 5 Term Rep. 21; in which latter the hiring, being "for five years, as a colt shearman, to work 12 hours each day," was considered as an implied exception of the other 12 hours in each day, and the whole of *Sundays*. And he endeavoured to distinguish this from the cases of *The King v. St. Agnes*, Burr. S. C. 671, and *The King v. Birmingham*, Cald. 77. and Dougl. 333, where the absence of the servant from his work on holidays and *Sundays* in the one case, and on other occasions in the other, was protected by the custom of the country.

Scarlett, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. If the argument be pushed to the extreme, there is not any contract of hiring in which there is not some implied exception. The law of the land breaks in upon such contracts as these on the *Sundays*; and the master in this case had as much right to the service of the pauper for the whole year as the law of the land will allow of. The distinction however is clear between this and the cases relied on. Here is an express hiring for a year, and no express exception in the contract of any part

of the year. But this is an attempt to introduce an implied exception from the practice of the particular house of manufacture in which the servant was engaged, though implied exceptions in the times of service by the custom of the country have been held not to break in upon general contracts of hiring for the year.

Per Curiam,

Order of Sessions quashed.

The King v. The Inhabitants of Oakley.

10 East, 491. Feb. 1, 1809.

A guardian in socage, residing on the ward's estate for 40 days, gains a settlement in the parish; and cannot be removed from the possession of it at any time.

UPON an appeal against an order of justices removing *John King* and *Mary* his wife from *Brill* to *Oakley*, both in the county of *Bucks*, the Sessions confirmed the order, subject to the opinion of this Court on these facts.

Thomas Hawes, about 38 years ago, inclosed a piece of waste land in the parish of *Brill*, and built a cottage thereon, which he occupied till his death. By indenture, dated the 3d of *November* 1796, he and his son *Thomas* demised the cottage to *James Hawes* for a term of 500 years; by way of mortgage, for securing 20*l.* and interest, which yet remains unsatisfied. *Thomas*, the son, afterwards married the pauper *Mary*, and resided in the cottage with his father until *June* 1801, when *Thomas* the father died intestate; leaving his said son his heir at law, who continued to reside on the estate till *November* in the same year, when he died intestate; leaving the pauper *Mary* his widow and four infant daughters, three of whom, at the time of the removal, were under 14 years of age. The widow continued, with her daughters, to reside on the said estate for more than 40 days (as it was afterwards agreed) after the death of her husband, before her eldest daughter attained the age of 14; and in *October* 1806, the widow intermarried with the pauper *John King*, whose legal settlement was in the parish of *Oakley*, and who, together with his said wife and her children, resided on the said estate from the time of the said marriage to the time of the removal. The estate at the time of the removal was of a less annual value than 10*l.* It was admitted by the counsel for the appellants, that *Mary King* had gained no settlement by any right of dower in the said estate. The questions intended to be submitted to the Court, were, first, whether *John* and *Mary King*, or either of them, gained a settlement by their respective residence on the estate as above stated? Secondly, Whether *Mary King* communicated any settlement gained by her residence before her marriage to her husband *John King*? Thirdly, Whether both, or either of them, were irremovable at the time of the order of removal.

The *Attorney-General* and *Best*, in support of the order of Sessions, argued on the first point only: that the widow did not gain a settlement by residing for 40 days on this estate as guardian in socage to her children, the heirs of her deceased husband. They admitted, that it was not necessary to the acquiring of a settlement by 40 days residence on an estate, that the party should have a beneficial interest in it at the time: as in the case of *The King v. Stone*, 6 Term Rep. 295, where an executor who held in trust for the widow during her life gained a settlement by such residence. But they said it was necessary to confer a settlement by residence on a party's own estate, that he should have either a legal or a beneficial interest in it: and they denied, that a guardian in socage had any legal interest in the property of the ward or heir, or any right to reside upon it *suo jure*, or otherwise than as the servant or bailiff of the ward, Co Lit. 89. a. A guardian in socage takes no interest in the land, but is only to take the issues and profits to the use of the heir, to whom he is to account at the age of fourteen, Co. Lit. 88. b. There-

fore he may be sworn for his ward, Gilb. Evid. 107. And though such a guardian may lease the ward's land in his own name, yet that is by virtue of the power or authority conferred on him by law. And they distinguished between the case of a guardian in socage and that of an executor or administrator, the latter of whom takes the whole legal interest in all real chattels, and may maintain trespass for injuries to the land, and recover the profits, if withheld, in their own names, as the only owners whom the law recognizes; and, what is most to the point, they may dispose of all the interest at law, and make a good title to a *bona fide* purchaser; and in no case are they accountable at law to the beneficial owner for the profits of the estate. But a guardian in socage is accountable at law to his ward in an action of account, and cannot make a title to a purchaser.

W. E. Taunton, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. There is no doubt in this case but that the mother, who was guardian in socage to her daughters, had a right to elect whether she would let the estate or occupy it for their benefit: and unless she let it, the law, which imposes the duty of a guardian upon her, would necessarily protect her in the personal occupation and superintendence of it. The only difference which can be pointed out, between the cases of an executor or administrator and of a guardian in socage, in this respect, is, that the one is accountable for the profits by statute, and the other at common law. The law considers a guardian in socage as entitled to the possession of the ward's property, and incapable of being removed from it by any person. Such a guardian has not a mere office or authority, but an interest in the ward's estate. It is laid down in *Wade v. Baker*, 1 Ld. Ray. 131, that he may maintain trespass and ejectment, avow for damage feasant, make admittance to copyhold, and lease in his own name. He cannot indeed convey the property absolutely as an executor or administrator, because the nature of the trust does not require it in the one case as it does in the other; but he may dispose of it during his guardianship, though accountable afterwards to the heir. The widow therefore had such an interest in the estate as rendered her irremovable from it.

GROSE, J. The question is, Whether the widow was irremovable from this property for 40 days? She had a right during her guardianship either to lease or occupy the estate; and if she chose to occupy it, she was irremovable from it as from her own, though liable to answer afterwards to the wards for the profits.

LE BLANC, J. The case though new in circumstance, is not new in principle. It is governed by the decisions which have taken place, that in order to make persons irremovable on account of having property in the parish, it is not necessary to have a beneficial interest in it for themselves, but it is sufficient that they reside there for some beneficial purpose to another. Now a guardian in socage has a right to the possession, and until she leases, it is for the interest of the wards that she should occupy the estate, and there can be no right to remove her from it to their prejudice: as in the case of an administrator, or of a sole next of kin even before administration granted, who has a right to reside on the leasehold property; and such residence for 40 days will give him a settlement in the parish.

BAYLEY, J. If a guardian in socage can maintain trespass and ejectment in his own name, and avow for damage feasant on the land, this shews that he has a right to occupy it. And this is confirmed by the old method of pleading by guardian in socage, which was, that he entered as guardian into the tenement in question, and was possessed. In like manner an administrator

has a right to the possession of leasehold property, and is only accountable for the profits(a).

Order of Sessions quashed.

The King v. The Inhabitants of Stoke-upon-Trent.

10 East, 496. Feb. 1, 1809.

Renting the hire or privilege of milking two cows belonging to another at so much per week per cow, for 40 weeks, which cows were to be depastured by the owner on his farm in common with his other cattle, and were to be milked by the pauper, will gain him a settlement, if the pasturage of the two cows be worth 10*l.* a year.

TWO justices by their order removed *Richard* and *Elizabeth Sheldon* and their three children by name, from *Stoke-upon-Trent* to *Norton-on-the-Moors* in the county of *Stafford*. The sessions, on appeal, quashed the order; subject to the opinion of this Court on these facts.

The pauper *Richard Sheldon*, being legally settled elsewhere, about seven years ago, under a verbal agreement, rented and paid for the hire or privilege of milking two cows belonging to *Mr. Repton* the sum of 5*s.* 6*d.* a week each cow, for forty successive weeks. The two cows were by the terms of the agreement to be depastured by *Mr. Repton* on his farm at *Norton-on-the-Moors*, in common with his other cows; and were in fact depastured on such of the lands belonging to the farm as *Mr. Repton* thought proper, in common with his other cattle. The pauper never went on the lands to fetch them: but they were regularly brought up with *Mr. Repton's* other cows to the fold yard, and there milked by the pauper and his family. During the time the pauper so rented the said cows, he resided in the parish of *Norton-on-the-Moors*, at a cottage for which he paid fifty shillings a year: and the depasturing of the two cows for the time aforesaid on the lands of *Mr. Repton* was, together with the cottage, worth more than ten pounds a year. The question was, whether the pauper gained a settlement in *Norton-on-the-Moors* by his renting of the cottage and of the cows as above stated.

Clifford and *Peake*, in support of the order of Sessions, said, that this was no more than a personal contract for the hire and privilege of milking two cows, and no tenement, which must lie in tenure and relate to land. The rule of law as laid down in *The King v. Lockerley*, Burr. S. C. 315, that an agreement for the use and feeding of cows is no tenement within the act, is correct: the error of that case lies in the misapplication of that rule to the facts of it; for there the dairyman took not only the cows and their feeding, but also the dwelling-house and the after-math of part of the ground, &c. and in short the whole dairy farm. And in *Rex v. Whitley*, 1 Term Rep. 138, *Buller, J.* said, that the best reason for that decision seemed to be that part of it where the Court held that it was not a lease of land, or any thing out of land; for it was only a right to the milk of the cows. And in *Rex v. Stoke*, 2 Term Rep. 451, the taking of hay, grass and after-math was held to confer a settlement, because the land was intended to pass. In *The King v. Piddle-trentide*, 3 Term Rep. 772, in which *Rex v. Lockerley* was overruled, the specific subject of letting was a *dairy*, which in dairy countries means the land itself on which the cows are fed, as well as the use of the cows; and the lessee had also the liberty of cutting furze on the farm for the use of the dairy; he had also a rabbit warren, and a house on it to keep the nets in: so that he

(a) Vide *Osborn v. Carden*, Plow. 298, where the Court consider that the whole estate and interest of the lands is in the guardian in socage, (which must be understood during the guardianship) to the use of the infant. And in *Bedell v. Constable*, Vaugh. 182, 8, he is said to have an interest, and not merely a naked authority, though it be an interest joined with a trust for his ward.

had evidently an interest in the soil beyond the mere use and feeding of the cattle. And *Buller, J.* there stated the true question to be, "whether it were a contract to receive profits out of land." Next came *The King v. Tolpuddle*, 4 Term Rep. 671, where by the terms of the contract the pauper was to have the exclusive right of feeding the dairy cows in certain closes for part of the year. He was also to have a dwelling-house on the farm, and the right of cutting fuel for the use of the dairy. There was a clear interest taken in the land. Lord *Kenyon* laid stress on the pauper's having for a part of the year the exclusive right to the pasturage of the grounds to be taken by the mouths of the cattle. *Ashhurst, J.* observed, that the pauper had the separate possession of a house, and that he rented not merely the milk of the cows, but the cows themselves, and the land under certain qualifications; for he had a right in certain closes even to the exclusion of the farmer himself. And *Buller, J.* said, that he had an interest in the land; and he also relied on the pauper's exclusive possession of particular grounds during part of the year. It is true, that in *The King v. Hollington*, 3 East 113, the pauper was holden to gain a settlement by renting the pasturage of two cows in a certain close for a part of the year, though his cows had not the exclusive feeding of it; but there the cows were the pauper's own; which was relied on by Mr Justice *Lawrence*, as falling within the words of Lord *Kenyon* in the case of *Piddletrentide*, that it was "a contract for the pernanacy of the profits of the land by the mouths of the cattle." And Lord *Ellenborough* compared it to the taking of a common in gross, which had been determined to confer a settlement in *Rex v. Dersingham*, 7 Term Rep. 671. In *Rex v. Minworth*, 2 East 198, also the pauper had the exclusive possession of the land on which the dairy cows were agreed to be depastured; but there no settlement was gained because the annual value of the land was not 10*l.* This species of contract for the run of cattle in the pasture of another was held to be no tenement in *The King v. Hammersmith*, 8 Term Rep. 450, note; (for having the privilege of feeding there for nothing could make no difference in that respect) because it conferred no interest in the land. If a contract for taking the milk of cows will confer a settlement, because the cattle must necessarily feed on the land in the mean time, the same consequence may be pursued to a contract for taking all the cheese of a farm made during a certain period. In *Lancashire*, geese are kept in large flocks for the sake, in part, of their feathers, and are turned out into the stubbles for a certain period; and a contract for taking all the feathers of the geese while kept there would, by the same rule, be a taking of a tenement. Here the gist of the contract is specifically for the hire and privilege of milking the cows of another for a certain period: the place and manner of their feeding are collateral to such contract, and such as the owner would have provided for the sake of his own cattle in order to make their milk most productive, if he had milked them on his own account. The cows were to be depastured in common with the owner's own cattle wherever he pleased on his farm; and the pauper had no other controul over them than the privilege of milking them. It was said by *Lawrence, J.* in *Rex v. Disbury*, M. 43 G. 3. 1 Nolan, 506, that a contract to feed cows generally, under which they might be fed with green tares bought in the market would not be a tenement.

Puller and Petit, contra, were stopped by the Court.

Lord *ELLENBOROUGH, C. J.* There is no solid distinction between this and the case of *Hollington*. There the pauper had only hired the depasturing of his own cows in common with the cattle of the owner in certain land; here he hired the cows themselves, which, for this purpose, are the same as his own together with their depasturing in common with the owner's other cattle, upon a certain farm; all included in one contract. If the cows here had been the pauper's own, this case would have been identically the same as the former; but that fact was no material ingredient in the former case: for

the cows are his own for the time that he hires them : and in some of the other cases where settlements were obtained under contracts of this kind, the cows were hired as well as their feeding. Therefore, without going at large into the general question which was agitated in those cases, I think that, consistently with the decisions, this must be deemed to be the taking of a tenement.

GROSE, J. It is too late now to unsettle the law which has been established by former decisions. It is said, that this is only a contract for a right to milk cows ; but it is more : for it is a contract to take the milk of cows to be depastured on a certain farm ; which is purchasing *pro tanto* the interest in those pastures on which the cows were to be fed. And this falls within the former decisions on the renting of dairies.

LE BLANC, J. It is only the words used in stating this case which make any real difference between it and former cases ; but it falls within the same principle. The only difference between this and *The King v. Piddletrentide* is, that there it was stated to be the renting of a *dairy*, which is only a contract for the hire and privilege of milking, which, during the time are to be depastured on the owner's lands. But there the cows were to feed in particular grounds at particular seasons of the year ; and here they were to be depastured on the farm in common with the owner's other cattle. In *The King v. Tolpuddle* the agreement was, as here, for the owner's cows at so much a-head ; and though they were to have the exclusive pasturage of certain grounds during part of the year ; yet that has since been held to make no difference. " If," said Lord *Kenyon* in the latter case, " the cattle had been the pauper's own, and he had rented the feeding of them, that would have been unquestionably a tenement ; like the taking of the pasture, the hay, and after-math ; and I think that these were the pauper's for a certain period, &c. ; and this was not the less a taking of a tenement because the pauper could only enjoy the land in a particular mode." The same reasoning will apply to this case. In *The King v. Minworth*, there was no doubt made but that the contract was for the taking of a tenement ; but the value of the land on which the two cows were to be depastured did not amount to 10*l.* a year, and therefore no settlement was gained. Now here the pauper contracted for the milking of two specific cows (not any two cows) which were to be depastured on the farm of the owner together with his other cattle ; the value of which pasturage, together with the cottage rented by the pauper during the same time, amounting to more than 10*l.* a year. Then it was decided in *The King v. Hollington*, that hiring the feeding of cows for a certain time, in common with the cattle of the owner of the pasture in which they are to be fed, is a taking of a tenement. This then is the same as if the pauper had hired the cows at so much, and the pasture for feeding them at so much more, though the two sums are compounded in one. And it being found here, that the value of the pasturage together with the cottage, amounting to 10*l.* a year, the pauper gained a settlement.

BAYLEY, J. This is a hiring of two cows, with the right of having them depastured on lands in the parish. The cases of *Piddletrentide* and *Tolpuddle* determined that it was not necessary that the cows should be the pauper's own ; and the case of *Hollington* determined that the pauper need not have the right to the pasturage exclusive of the cattle of other persons. Those three cases, therefore, have decided the present. The agreement here was, that the owner should *depasture* the cows upon his farm in the parish ; which must mean that they were to be fed on the pasture growing on the land : if, therefore, he had fed them in any other way, it would have been a breach of his contract.

Order of Sessions quashed.

Meredith and Others v. Meredith and Another.

10 East, 503. Feb. 3, 1809.

Under a devise to *H.* of certain tenements by name for her life; provided that if *S.* and *A.* [to whom and to whose children the reversion and inheritance of the premises were intended if *H.* should die without issue] should give *H.* 1000*l.* for her life estate, then the testator devised all and singular the said estate and premises called, &c. to *S.* and *A.* for their lives, share and share alike; and on the death of either, their moiety unto and among the children of the survivor and their heirs, share and share alike, &c. as tenants in common, &c. Provided that if *H.* should die in possession of the premises single and without issue, then he gave the said estates and premises to *S.* and *A.* and to the issue of their bodies lawfully begotten, or to be begotten, and their heirs, as tenants in common, *as aforesaid*; held that the words *as aforesaid* drew down to the second clause the limitations of the first, and shewed that the testator meant that *S.* and *A.* and their children should take the same estate on *H.* dying in possession without issue, as they would have done if the 1000*l.* had been paid; and held also, that a younger child of *A.* born after the death of the testator and before the death of *H.*, or of *S.* (who died without issue) was entitled to share in the moieties both of *S.* and of *A.*; and that the eldest son of *A.* was also entitled to share in both moieties, though he died before *A.*; and on his death his share in *S.*'s money descended immediately to his next brother and heir at law, as did also his share in *A.*'s moiety, on her death after him.

CHARLES NEWCOMB being seised in fee of the estates in question in *Herefordshire*, by his will dated the 8th of *November* 1760, duly executed and attested, devised (*inter alia*) as follows: "Also I give and devise to my daughter *Hannah Newcomb* the tenements called *Llilton*, in the parishes of *Discoyd* and *Presteigne* in the county of *Hereford*, &c. and the tenement called the *Bower* in the parish of *Kington* in the said county, with all the lands, &c. thereunto respectively belonging; to hold unto my said daughter *Hannah*, during her natural life, without impeachment of waste. Provided, that if my son *Spencer Newcomb*, and my daughter *Ann* the wife of *John Meredith*, to whom and to whose children I intend the reversion and inheritance of the said lands and premises upon the estate for life of my said daughter *Hannah* being determined, in case *Hannah* shall die without issue of her body lawfully begotten, shall be minded to pay the said *Hannah* 1000*l.* as and for a consideration for her estate for life in the said premises; then and on full payment thereof, I give and devise all and singular the said estate and premises, called *Llilton*, and the *Bower*, hereinbefore mentioned, and intended to be devised to my said daughter for her life as aforesaid, and every part and parcel thereof, to my said son *Spencer Newcomb* and *Ann Meredith* my daughter, during their natural lives; the profits whereof to be equally divided between them, share and share alike. And from and after the decease of the first of them so dying, I give and devise the moiety part or share of him or her, so dying, unto and among the child or children of him or her, so dying, and his, her or their heirs: remaining part or share to the survivor of them, the said *Spencer* and *Ann*, and his or her issue lawfully begotten, equally to be divided between them share and share alike. And in case my said son *Spencer* shall not marry and have issue, then I give and devise his moiety of all and singular the said lands, &c. after his life, and the reversion and inheritance thereof, unto and amongst the child or children of my said daughter *Ann*, by *John Meredith* her husband begotten or to be begotten, and his or their heirs for ever, to be equally divided between them, as tenants in common, and not as joint tenants. Provided, that if my said daughter *Hannah* shall die in possession of the said premises single and unmarried, and without any lawful issue of her body; then I give and devise the said estates and premises called *Llilton* and the *Bower* to my son *Spencer* and my daughter *Ann*, and to the issue of their bodies lawfully begotten or to be begotten, and their heirs, to take as tenants in common and not as

"joint tenants, *as aforesaid*. 'But if my daughter *Hannah* shall marry and have issue; then I do hereby revoke the devise hereinbefore made to her for life, *as aforesaid*, and all and every the limitations made thereupon; and I do give and devise all and singular the said estates and premises to her the said *Hannah Newcomb* and the heirs of her body lawfully issuing for ever, any thing herein contained to the contrary thereof in any wise notwithstanding."

The testator died some time after making his will; leaving *Spencer Newcomb* his only son, and his two daughters, *Hannah Newcomb*, and *Ann Meredith*, and *John Meredith* since deceased, the defendant *Thomas Meredith* and the plaintiffs *Charles Meredith* and *William Meredith* and *Edward Meredith* the then five only children of his daughter *Ann Meredith*, him surviving. And after the testator's death, but during *Spencer Newcomb's* lifetime, *Ann Meredith* had only one other child by her husband. *Spencer Newcomb* and *Ann Meredith* did not pay *Hannah Newcomb* the 1000*l.* in the will mentioned for her life estate; and *Hannah Newcomb*, upon the testator's death, entered into the possession of the said estates, and continued so till her death. *Spencer Newcomb* died in 1767, unmarried and intestate; leaving *Hannah Newcomb* and *Ann Meredith* his co-heiresses, and co-heiresses of the testator. *Hannah Newcomb* died in 1783, unmarried and intestate; leaving *Ann Meredith* her sister and heiress her surviving; whose eldest son *John Meredith* died in 1787, intestate and unmarried; leaving his next brother *Thomas Meredith* his heir at law; which *Thomas* is now the heir at law of the testator *Charles Newcomb* and of *Spencer Newcomb* and *Hannah Newcomb*. *Ann Meredith* died in 1800, intestate; leaving *Thomas* her then eldest son, and *Charles*, *William*, and *Edward Meredith*, and *Spencer Newcomb Meredith*, her only other children her surviving, and who are all now living. *John Meredith*, the husband of *Ann*, survived her, but is since dead. *Charles*, *William*, and *Edward Meredith*, exhibited their bill in Chancery against *Thomas Meredith* and *S. N. Meredith*; praying that the shares and proportions belonging to the plaintiffs and defendants in the said devised estates might be ascertained and settled, and that a partition of them be made accordingly under the decree of that Court: to which bill the defendants appeared and put in their answer; and on the hearing of the cause, the Master of the Rolls directed this case to be stated for the opinion of this Court, upon the following question: What shares and interests *Thomas*, *Charles*, *William*, *Edward*, and *Spencer Newcomb Meredith*, the children of *Ann Meredith*, took, and are now entitled to, in the estates in question, under the will of *Charles Newcomb*?

Wetherell for the plaintiffs contended, that the second clause or proviso in the will, which applies to *Hannah Newcomb's* dying in possession of the estates, must be coupled with the first clause, and particularly by reason of the words *as aforesaid* which are used at the end of the second clause: and that the testator intended by the second clause, that *Spencer Newcomb* and *Ann Meredith* respectively, and their children, should take the same interests in the event of *Hannah Newcomb's* dying in possession, as are expressed in the first clause in the event of the 1000*l.* being paid to her. And consequently, that under the limitations, expressed in the first clause, *Spencer Newcomb* and *Ann Meredith* took estates for live, estates in common, with remainders to their respective children as tenants in common in fee of a moiety: with a remainder over of *Spencer Newcomb's* moiety on failure of his children to the children of *Ann Meredith* as tenants in common in fee. According to which construction, in the events which have happened, *Thomas Meredith* in his own original right, and as heir of his brother *John* (if *John* were entitled to share), is now entitled to 2-6ths of each moiety in fee, and each of the other children is entitled to 1-6th in each moiety in fee. But if *John* were not entitled, then they would all share equally. As grounds for this construction, he urged, 1st, the

words of relation (*as aforesaid*) in the second clause to the first, which could only refer to the limitations to the same parties, and for the same estates, in the event of *Hannah Newcomb's* dying in possession, as if she had been bought out by what the testator deemed an equivalent for her life estate: and a devise may be as effectual by words of relation as by express words; as in *Lisle v. Gray*, 2 Lev. 223, *Love v. Davies*, 2 Ld. Ray. 1561, and other cases. 2dly, Every word of the will by this construction will have its effect, and there will be no contradiction between the two clauses. 3dly, The probability of the testator's intention is in favour of it, because this construction accords with his general intent before expressed in the first clause: and this absurdity would follow from a different construction, that if the parents chose to pay the 1000*l.* the children would take immediate vested remainders in fee after the life estates of the parents; but if the parents did not pay the money, they themselves would take a greater estate, and the children would take no interest but what their parents might deprive them of. He next submitted whether *Thomas* the brother and heir of *John Meredith* was entitled to *John's* share, *John* having died before his mother, and before the period of division. But he admitted that *S. N. Meredith*, the youngest son of *Ann Meredith*, was entitled to share with the other children, though born after the death of the testator, being born before the period of division arrived; and cited *Ellison v. Aiery*, 1 Ves. 111. *John Meredith*, the son of *Ann*, was living at the death of the testator, and of his uncle *Spencer Newcomb*, and of his aunt *Hannah*, but died before his mother: and there may seem to be an inconsistency in letting in children born at any time before the period of division, and yet retaining in those who die before that period, whose shares are thus liable to be altered after their deaths: but though the share may be vested in interest, yet it need not be vested in quantity, but be liable in this respect to be varied by letting in afterborn children. In *Baldwin v. Karver*, Cowp. 399, though the grandchildren were all living at the time of the distribution, and therefore this question did not necessarily arise, yet it seems by the certificate that the Court meant to say, that being alive at the time of distribution was necessary to enable them to take.

Abbott, on behalf of the defendant *Thomas Meredith*, submitted that as the 1000*l.* was not paid to *Hannah Newcomb*, the limitation contained in the first proviso of the will did not take effect at all, but gave way to the other distinct limitation in the second proviso; under which *Spencer Newcomb* and *Ann Meredith* (the son and daughter of the testator) were entitled in remainder, after *Hannah's* death, to several estates for life, in undivided moieties with several remainders to their respective children, as tenants in common in fee of the parent's moiety; and *Spencer Newcomb* never having had any children, the defendant *Thomas Meredith* is now entitled to the whole of his moiety, as his heir at law, and also to 2-6th of *Ann's* moiety. Or that at any rate, under this limitation, *Spencer* and *Ann* were each entitled to an estate tail in a moiety, and that *Thomas Meredith* is now entitled to one moiety in fee and to the other moiety in tail. He suggested, that in the events which had happened, of *Hannah's* being permitted to remain in possession till her death, and *Spencer's* dying without issue, the testator might have considered, that it was sufficient to let the younger children of *Ann* share in her moiety, and leave the other moiety to go to the eldest son and heir; although if *Ann* and *Spencer* agreed to buy out the life estate of *Hannah*, who was the first object of the testator's bounty, the estate should go in moieties respectively to all their children. The second clause, he contended, had no relation to the first, except as the words *as aforesaid* might be construed to mean that *Spencer Newcomb* and *Ann Meredith*, and their respective children, were to take (if at all) as tenants in common of their respective moieties: all beyond that is mere conjecture. If *Hannah* had issue, the testator revoked all his former devises to the others: and though *Spencer* and *Ann* had bought ought *Han-*

nah, yet if she had issue afterwards, it could only have concluded her life estate, but not the interests of her children. If he had intended that the same consequence should ensue in both the events, he would have provided for it in one clause, "if *Hannah* should die single and without issue," or "if *Spencer* and *Ann* shall pay her 1000*l.*, then I devise," &c.

Lord ELLENBOROUGH, C. J. If the words of reference "*as aforesaid*," meant any thing, they must have the meaning which the plaintiff's counsel have given to them: and no sound reason can be suggested why the testator should have intended to make a difference in the estates which the children were to take, whether the parents bought out *Hannah* or not; and if they did buy her out, he does not devise over merely her life estate, but "all and singular the said *estate and premises called Lliton and the Bower*, &c. Then the words *as aforesaid* in the latter clause necessarily draw down and incorporate the words in the former clause: his son *Spencer* and his daughter *Ann* and their issue, &c. are to take, in the event of *Hannah* dying in possession unmarried and without issue, as tenants in common *as aforesaid*. To say that these latter words only meant that they were to take as tenants in common in their respective moieties, is to give no meaning to the words *as aforesaid*, but to make them a mere useless repetition: but it is always desirable, if possible, to give effect to all the words of a will, and particularly when it enables the Court to give a uniform and consistent sense to the whole will. Then, on the death of *Spencer*, *John's* interest was vested, and went on his death to his brother *Thomas*. We will certify our opinions.

Afterwards, the following certificate was sent to his Honour.

This case has been argued before us by counsel: we have considered it, and are of opinion that upon the true construction of this will, *Spencer Newcomb* and *Ann Meredith*, respectively, and their children, were to take the same estates upon *Hannah Newcomb's* dying without issue, as they would have done had the 1000*l.* been paid: and consequently, that *Thomas Meredith* is entitled to one sixth part in the abovementioned estates as heir to his brother *John Meredith* in fee: that he is entitled to other one sixth in fee in his own right: that *Charles Meredith*, *William Meredith*, *Edward Meredith*, and *Spencer Newcomb Meredith* are entitled to one sixth each in fee; and that the said parties are tenants in common, and not joint tenants.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

The King v. Mitchell.

10 East, 511. Feb. 3, 1809.

Freemen of *Norwich*, substitutes in the militia, quartered at *Colchester*, but having dwelling houses in *Norwich*, in which their families resided, and to which they at times resorted on furlough, (in some instances, within the last six months, only for the purpose of voting at elections;) held to be *inhabitants* within the charter of *Norwich*, and a local act requiring them to have been inhabitants for six calendar months previous to certain elections of corporate officers, in order to qualify them to vote.

THIS was an information in nature of a quo warranto against the defendant, for usurping the office of a common councilman of the city of *Norwich*; to which he pleaded (inter alia) that by charter of the 21st of July, 5 Hen. 6, the king granted that the citizens and commonalty of the city should annually elect 60 of the citizens for the common council out of the four wards of the city; and that the citizens *inhabiting* in the ward of *Wymer* should, on a certain day after *Passion Sunday*, be at the *Guildhall*

and they, or the major part, should elect 20 discreet and sufficient persons of the ward to be common councilmen for the year ensuing. And that by stat. 3 Geo. 2, it was enacted, that for the future no more than 3 common councilmen of each great ward should be yearly elected by the freemen of each great ward. That on the 19th of *March* 1807, the citizens of the ward of *Wymer* were convened to elect 3 common councilmen; and that the defendant and several others were candidates. That the numbers at the election were, for *Forster* 255: for the defendant 229; for *Staff* 227; for *Proctor* 226; &c. and that the defendant was declared duly elected, and took the oaths, and was admitted into the office. The prosecutor replied that the defendant was not duly elected. At the trial before the Lord Ch. Justice of *C. B.*; it being understood between the parties that the validity of *Mitchell's* election depended upon the votes of 4 freemen of the ward of *Wymer*, named *Jessop*, *Lucas*, *Funnell*, and *Emms*, whose votes were objected to on the ground that they were not inhabitants within the ward six calendar months before the election, according to the oath required to be taken by the stat. 3 Geo. 2; the council for the defendant proceeded to examine witnesses to prove the inhabitancy of those 4 persons. 1st, *Jessop* proved that he was a substitute in the *Norfolk* militia for 3 years and a half before the election, rented a house in *Wymer* ward at the rent of 2l. 12s. a-year, in which his wife and child continued to live all the time, and whither he repaired many times after he went into the militia. He was at home there on furlough for 22 days about the beginning of 1806; and went there again on the 14th of *October* 1806, and staid six weeks; and again at *Christmas* 1807, when he continued there 15 days, and returned there again on the 25th of *February* 1807, and staid till the 23d of *March*. On the 18th of the same month the election took place. During all these times he dwelt at his own house. He also attended the election at *Norwich* for members to serve in parliament in *November* 1806, and had his leave of absence afterwards prolonged. The house which he rented was not rated to the poor. 2. *Lucas*, another freeman who voted for the defendant, was also a substitute in the *Norfolk* militia, and had been so for 3 years before, during all which time he had a small house in *Wymer* ward, which he rented by the quarter, in which his wife and children continued to live. He went home 3 days before the election in 1807, and staid there 14 days. He was also there 14 days on furlough about *Christmas* 1804, again after the *Christmas* following for 21 days, and again in *December* 1806. He was again in *Norwich* four days before the election in *March* 1807, and staid twenty-one days, and again in *November* for fifteen days, and again at the election in *March* 1808 for 17 days. At all other times he continued with his regiment: and when he was at *Norwich* he always lived with his wife and children at his house. At the time of the election in question, he came there for no other purpose than to vote: and in *October* 1806 he went there for the purpose of voting at the then next general election. The 3d voter *Funnell*, had a wife and children, and had lived at different houses in *Wymer* ward for 10 years; and had been a substitute in the militia for 5 years from *August* 1803. He went home to his family at *Christmas* 1803, on furlough for 3 weeks, and at the following *Christmas* for 15 days, and for the like period at the beginning of 1806. He also had a pass for 10 days at the general election in *November* 1806, and a furlough for 15 days longer, and was again at home for 15 days at *Christmas* 1806. He was at the election in *March* 1807, on furlough for 12 or 14 days; and again at home at *Christmas* 1807. His wife and family lived in his house during all the time, and he was at home with them on these occasions. *Emms*, the 4th voter, was also a substitute in the *Norfolk* militia about 6 years and a half before, and had a wife. In *January* 1806, having before lived in *Norwich*, he took a house in *Wymer* ward of the defendant at 38s. a year; and kept it for a year and a quarter. It was not rated to the poor. His wife lived in it till the 29th of *February* 1807, and then went to *Colchester* to see him a few days,

and had remained there ever since. She left furniture in the house and brought away the key. *Emms* went to the election in question with a pass; arrived at *Norwich* 3 or 4 days before the election, and resided at his father's house in *Wymer* ward. After the election he took the furniture out of his house and carried it to his father's. He remained in *Norwich* some days after the election. He went to *Norwich* with a pass at the time of the general election in *November* 1806, but was not in *Norwich* again till he came to vote for the defendant. During the period spoken to by these witnesses, it appeared that the regiment to which they belonged was quartered at *Colchester*; and it was admitted that they had taken the oath prescribed by the act of the 3 Geo. 2. c. 8. after mentioned. And evidence of usage was offered, that persons so circumstanced had always been admitted to vote; but this evidence was rejected by the Chief Justice of *C. B.* A verdict was by consent taken for the Crown, with liberty for the defendant to move to set it aside, in order that the opinion of the Court might be taken, whether under the stat. 3 Geo. 2. c. 8. the several persons mentioned had a right to vote in the election of the defendant.

Sellon, Serjt. (with whom were *Dampier* and *Best*) accordingly moved in the last term, that the verdict should be set aside, and a verdict entered for the defendant, on the ground that the acts regulating the constitution and right of election for corporate offices in *Norwich*, which speaks of *inhabitants*, must be construed with reference to the general law respecting inhabitancy; and that these several voters were in that sense *inhabitants of Norwich* at the time of the election in question.

The stat. 3 Geo. 2. c. 8. for regulating elections in the city of *Norwich* enacts (s. 3.) that "In case of any election of any alderman or common councilman for the said city, every person, (except such as are and shall be placed in any of the hospitals or workhouses of the said city, or are or shall be prisoners for debt in the common goal or other prisons of the said city,) before he is admitted to poll at such election, shall, instead of the oath or affirmation required by the stat. 9 G. 1. c. 9. take the following oath, &c. You do swear that you are, and for 12 calendar months have been, admitted a freeman of the city of *Norwich*, and for six calendar months last past have been an *inhabitant* within the ward of () mentioning the ward," &c. By s. 4. To prevent disputes which may arise touching the votes of persons in the hospitals or workhouses, or of prisoners for debt in the prisons of the said city, it is enacted that none such shall be admitted to poll at any such elections; "save only at such elections as shall happen for that ward in which he shall have inhabited 6 calendar months immediately preceding his being placed in such hospital or workhouse, or immediately preceding his imprisonment for debt in such common gaol or other prisons," &c. And a form of oath is given in corresponding terms; and by s. 6 a poll clerk is to be admitted into these places to take the votes of such as are there confined.

Wilson and *Storks* now shewed cause against the rule; and observing that the defendants must be ousted if 3 out of the 4 votes objected to were bad, they confined their objection principally to the 3 last mentioned voters considering *Jessop* as more favourably situated than the rest, by reason of his having resided in the ward with his family within six months preceding the election for other purposes than merely that of voting; which was the only object for which the rest came; but none of them having had a continual residence there for such antecedent period as is required by the act, though they had houses and families there. These men were all substitutes and not ballotted militia men, and therefore they were under no compulsion of law to be absent but such as was of their own choosing when they entered voluntarily as substitutes, and therefore their situation is not at all different from that of ordinary soldiers. The actual place of their inhabitancy, during the period in question, was at *Colchester*, where the regiment lay, and therefore

could not be said to be at *Norwich*, either within the plain words or the reasonable construction of the *Norwich* act. The privilege of voting in the place is given in return for the burthens which actual inhabitancy throws upon the citizens, and for the performance of which *personal* residence is necessary ; such as keeping watch and ward, and executing corporate duties. *Inhabitancy* does not differ in its legal and ordinary sense from *residence* or *dwelling*, when applied to the performance of personal duties ; though for the purpose of subjecting the owners of property to charges laid on them in respect thereof, it has been taken in a larger sense ; as in the case of the statute of bridges, commented upon by Lord Coke, 2 Inst. 702, 3, on the stat. 22 H. 8. c. 5 ; which statute plainly points at persons, holding property in the county, &c., though residing in another place ; and also in the case of the riot act, *Atkins v. Davis*, Cald. 315. No middle line can be drawn in this case : for if these substitutes had a right to vote as being *inhabitants* within the ward *for six calendar months before the election*, merely because they held houses there during that period, though personally resident and compelled to reside elsewhere during the greater part of the time, and their residence there being only casual, and by leave, for the special purpose of voting ; it will follow that every common soldier, though quartered in another place, may be deemed an inhabitant of *Norwich* under the like circumstances. Admitting that a daily residence is not necessary to make a man an inhabitant of a place, according to *Sargeant's* case, 5 Term Rep. 466, if the party have a *bona fide* domicile there, and do not take it colourably ; and supposing that some latitude is allowable even where inhabitancy for a precise period is in question ; still it cannot, without destroying the qualification altogether, be extended further than to allow of casual and short temporary absences during the required period, and not to cases of this description where the party is necessarily absent during the greater part of the time, and his going to reside at all in the place must depend wholly upon the will of another. They also reasoned upon the particular provision in the local act of the 3 Geo. 2, respecting freemen residing in gaols or hospitals ; which they said was unnecessary upon the construction contended for by the defendant, as those persons, if they had families domiciled within the city, would still have been entitled to vote. [But the Court considered, that the object of this provision was altogether distinct, and was meant to preclude any claim of voting for the wards in which such hospitals and prisons were by reason of their inhabiting the same.

Lord ELLENBOROUGH, C. J. The act in question requires and ought to receive a reasonable construction, according to the subject matter of it, and the manifest object of the legislature. The act meant to secure the right of voting for corporate offices to the freemen *bona fide* inhabitants of the city for a certain period before the election, and is therefore satisfied by a *bona fide* inhabitancy. Now, of what other place but of *Norwich* could these men be said to be inhabitants at the time ? They had their own dwelling-houses or homes there, in which they left their families dwelling, and to which they returned from time to time when they obtained leave of absence from their regiment. They had no other abiding place than this ; for the place where the regiment happened to be quartered could not be considered as such ; and though they could not perform watch and ward at *Norwich*, yet they were liable there to all public burthens in respect of their houses there in which their families dwelt. They were therefore to be considered as *bona fide* inhabitants of the city, subject to have their inhabitancy there interrupted by the calls of the public service ; and as all who are ballotted cannot serve in person, I think their absence on duty would be as much protected upon the ground of the exigency of the public service as if they had been themselves ballotted men.

GROSE, J. These men were *inhabitants* of *Norwich* within the fair and

honest sense of the word, and the reasonable construction of the local act. They had their dwelling-houses there, for which they paid rent, and in which their families were inhabiting while they were upon duty. If they were not inhabitants there, of what other place could they be fairly said to be inhabitants?

LE BLANC, J. I think that these persons were inhabitants of *Norwich* during the period in question within the true meaning of the act of parliament: and I cannot consider that their habitation was at *Colchester*, whether they were in fact living there in barracks or in quarters. And if the regiment had been in barracks, or quartered at *Norwich* in a different ward from that in which the men had their houses and families, and the question had been whether they were to be considered as inhabitants of the one ward or the other, I should have said, that they were inhabitants of the ward in which their houses were. It seems to me that the provision respecting freemen in gaols or hospitals was introduced in order to regulate in what ward such persons were to be considered as inhabitants. They were still to be considered as inhabiting within the city: but they were to vote for that ward where they were inhabiting for six months before they went into the gaol or hospital; but this is confined to persons in gaols or hospitals within the city. Now, these men are much more to be considered as inhabitants, who being soldiers must necessarily be absent from their proper homes with their regiment; but who during all the time had houses of their own in the place in which their families dwelt, and to which they themselves resorted when absent from the regiment on furloughs.

BAYLEY, J. These men were honestly, by the medium of their families inhabitants of *Norwich* at the time. It was an honest, and not an occasional residence there, within the fair meaning of the law(1).

Rule absolute for entering a
verdict for the Defendant.

Doe, on the Demise of Wm. Askew and Another, v. Agnes Askew.

10 East, 520. Feb. 4, 1809.

Entries on the rolls of a manor court of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held *during her chaste viduity*, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence; although there were no instances in fact stated on the rolls, or known, of such a forfeiture having been enforced.

THIS ejectment was brought by devisees in remainder after the customary estate of the last tenant's widow, to recover a customary estate held of the manor of *New Hatton* in *Westmorland*, in the possession of the defendant, who was the widow of *Roger Askew*, the customary tenant last seised, and who held the same, as was alleged, by the custom of the manor, *during her chaste viduity*; on the ground of her having forfeited her estate by incontinence during her widowhood. The fact of her having had a child long after her husband's death, and before the demise laid, being proved, the steward of the manor, of which Lord *Lonsdale* was the lord, gave evidence of the custom, that the widow of a customary tenant dying seised, on paying a heriot, holds during her *chaste viduity*, and loses her estate if she marry or have a child.

(1) See *Barnet's case*, 1 Dall. 152. *Taylor v. Knox & al.*, 1 Dall. 158. *Lyle v. Foreman*, 1 Dall. 480. *Respublica v. Steele*, 2 Dall. 92. *United States v. Penelope*, 2 Pet. Adm. Dec. 488, as to the legal meaning attached to the word "Inhabitant."

[See *Miller's estate*, 3 R. 312. *Sears v. City of Boston*, 1 Met. 250. *Thorndike v. Same*, do. 242. *Kilburn v. Bennett*, 3 do. 199.—W.]

That if a man die leaving a widow, and devise his estate to another, the devisee is not admitted till her death, or the sooner determination of her estate. And that when an heir or devisee is admitted on the determination of a widow's estate, it is usual in the admission to take notice of the widow's estate, and how she loses it, whether by marriage or otherwise: as thus: the party prays to be admitted: *such an one, widow, who held the same during her chaste viduity, according to the custom of the manor*, being now married, or being now dead, &c. That he had known many instances of such admissions. The same witness however proved; that *he had known no instances in fact where a widow had lost her estate by incontinency during her widowhood*: and that the simple term *viduity* was used as often as *chaste viduity* in the admissions. Another witness who had been acquainted with the manor for 50 years (which was long before the time spoken to by the steward of his own knowledge) also deposed to the custom being for the widow to hold during her *chaste viduity*; though he knew no instance in fact of the forfeiture of a widow's estate for unchastity. But in 1753, (being an attorney) he was proceeding to get an affidavit of a widow having had a child, in order to get an admission; but she dying, it became unnecessary. On this evidence it was objected at the trial, by the defendant's counsel, that as there was no instance in fact proved of a widow's losing her estate by unchastity, that part of the custom as to *chaste viduity* was not proved. But Wood, B., before whom the cause was tried, being of opinion that the entries on the rolls of admissions noticing and recognizing the custom, and the parol evidence above stated, were sufficient to prove it: a verdict was taken for the plaintiff; and a recommendation was given by the learned Judge to the defendant's counsel to take the advice of this Court upon his direction.

Topping, accordingly obtained a rule in last *Michaelmas* term, which he was now called upon to support, for setting aside the verdict and granting a new trial, on the ground that the custom for the widow to forfeit her estate for unchastity was only proveable by evidence of instances in fact of such a forfeiture having been enforced. He urged shortly the danger of establishing a cause of forfeiture by custom merely from the form of some of the entries of admissions of third persons made by the lord's steward, unsupported by any evidence of its having been acted upon, and contradicted by other entries on the rolls.

Cockell, Serjt. was stopped by the Court.

Lord ELLENBOROUGH, C. J. There was certainly evidence of the custom relied on to go to the jury, though no instance were known of a widow having in fact forfeited her estate for this cause. It might have happened that from fear of the forfeiture, or from the sense of moral obligation, no such instances of forfeiture had occurred. The custom would then come to be decided by evidence of the form of admissions only. Those that were made *durante casta viduitate*, if uncontradicted, would be evidence that such was the condition on which the estates in the manor were originally granted out: and these are not necessarily contradicted by the entries of admissions *durante viduitate* generally; for they might be understood of a viduity according to the custom, which the other entries would shew to be a *chaste viduity*. There is therefore no necessary contradiction between them; and the jury have decided the question.

Per Curiam,

Rule discharged.

Doe, on the Demise of Moreton, v. Roe.

10 East, 523. Feb. 6, 1809.

A plea of ancient demesne permitted to be filed *de bene esse* within the four first days, pending a rule nisi for permission to allow the plea so filed.

READER applied, on *Thursday* the 26th of *January*, for a rule in this ejectment, calling on the plaintiff to shew cause why the defendant should not have leave to plead, that the lands specified in the declaration are holden in ancient demesne, and why the plea to that effect on that day filed should not be allowed. This was founded upon an affidavit by the tenant in possession, that the premises in question were holden of Sir *William Dolben*, Bart., as of his manor of *Thingdon* in *Northamptonshire*, which manor is holden in ancient demesne: and that there is a court of ancient demesne held within the manor, and suitors thereof, in which court and before which suitors the lessor of the plaintiff might have proceeded in ejectment: and that to the best of his belief the lessor of the plaintiff is seised in fee of the premises in the declaration mentioned. This application was made in consequence of the rule recognized in *Doe d. Rust v. Roe*, 2 Burr. 1046, that such a plea can only be pleaded with leave of the Court upon a proper affidavit. But a difficulty occurred, that this being a plea in abatement must be pleaded within four days; and that time would have expired before cause could be shewn and the plea pleaded: wherefore the Court, after consideration, gave leave to the defendant to file his plea within the time *de bene esse*, and directed the rule to be drawn up in the form abovementioned.

Bramston now shewed cause against the rule; and after admitting that the defendant's affidavit was made in conformity to the requisitions of the former case, relied principally upon an affidavit made in answer to the rule, stating that a considerable part of the premises in question were copyhold and parcel of the manor of *Thingdon* aforesaid: and that the steward of the manor could find no instance of any proceedings taken in the manor court for recovering possession of lands held in ancient demesne of the manor. And he observed, that copyholds were not held of the manor, but of the lord, according to the custom of the manor: and for these the remedy was different, as appears by *Fitz. Na. Brev.* 23. 25. And in *Brittle v. Dade*, Salk. 185, it was held that the jurisdiction of the lord's court in ancient demesne extends only to lands holden of the manor, and not to copyhold, which is parcel of the manor.

LORD ELLENBOROUGH, C. J. You may reply that matter if the plea of ancient demesne be not good with respect to copyhold: but we cannot divide the merits of the plea on affidavit. Here there is a sufficient affidavit, that the lands for which the ejectment is brought are ancient demesne, to require us to admit the plea.

Rule absolute.

Cammack v. Gregory.

10 East, 525. Feb. 6, 1809.

Debt on bond where the plaintiff recovers a verdict for nominal damages only, and takes his judgment for the penalty, is not within the relief of the stat. 43 G. 3. c. 46. s. 3, enabling the court to allow the defendant costs, if the plaintiff do not recover the amount of the sum for which he had held the defendant to bail.

TO debt on bond, conditioned for the payment of money, the defendant pleaded severally, *non est factum*, usury, and a set-off; and all the issues be-

ing found for the plaintiff at the trial, he took his verdict with 1*s.* damages and 40*s.* costs. And now application was made by *Garrow* and *Wild*, on the stat. 43 Geo. 3. c. 46. s. 3., for costs to be allowed to the defendant on the ground that he had been held to bail for 65*l.* when, by the plaintiff's own admission at the trial, no more than 50*l.* was due. But

The Court, without entering into the merits, were of opinion that the verdict being merely for nominal damages, and the judgment being for the penalty of the bond (within which special bail had been taken) the case was not within the act: which only gives the Court jurisdiction to award costs for the defendant after verdict for the plaintiff, in cases where the plaintiff shall not recover, (which means recover by verdict of a jury) according to the real estimate of the damages, the amount of the sum for which he had held the defendant to special bail, without reasonable or probable cause. And therefore they refused the application(1).

Parke and *Lawes* for the plaintiff.

Liddard v. Lopes and Another.

10 East, 526. Feb. 7, 1809.

Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship to freight to the defendants on a voyage from *Shields* to *Lisbon*, with convoy; *the freight to be paid on right delivery of the cargo*; the ship having sailed from *Shields* with her cargo and joined convoy at *Portsmouth*, and after being detained near a month off *Lymington*, her sailingorders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants having refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendants, and then was sold by consent of both parties without prejudice: held that the plaintiff could not recover freight *pro rata* or demurrage.

THE plaintiff brought *indebitatus assumpsit* for the freight of goods, and also for the use and hire of a ship used by the defendants with a cargo belonging to them; with counts also for demurrage, and for work and labour: and at the trial before Lord *Ellenborough*, C. J. in *London*, a verdict was taken for the plaintiff for 1000*l.* subject, as to the amount, to the award of an arbitrator, if the court should be of opinion that the plaintiff was entitled to recover upon the following case.

The plaintiff was the owner of the ship *Mayflower*: the defendants were merchants in *London*: and on the 24th of *August* 1807, an agreement in writing, in the nature of a charter-party, was entered into between them, whereby it was "mutually agreed between *W. Liddard*, owner of the ship the *May-Flower*, then lying at *Hull*, and Messrs. *Lopes* and *Collins* of *London*, merchants, that the said ship being tight, &c. should, with all convenient speed, proceed to *Shields*, and there load from the factors of the freighters a full and complete cargo of coals in bulk, and proceed therewith to *Lisbon* with the first convoy, and deliver the same on being paid freight, at the rate of 45*l.* per keel, together with 5*l.* per cent. primeage, in lieu of port charges and pilotage, (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever, during the said voyage always excepted; *the freight to be paid on right delivery of the cargo*. Fifteen running days are to be allowed the said merchants (if the ship is not sooner dispatched) for unloading the ship at *Lisbon*, and the customary time to load at *Shields*; and ten days on demurrage over and above the said laying days at 5*l.* per day. Penalty for non-performance of this agreement 500*l.* Soon after this agreement was made, the ship took in a cargo of ten keels of

(1) Vide *Raveroy v. Alfson*, 13 East, 90.

coals belonging to the defendants at *Shields*, and sailed thence on the 3d of *September* 1807, and arrived at *Portsmouth* on the 15th, in order to join convoy. On the 20th, the Capt. having received sailing instructions, sailed with the convoy from *Portsmouth*, and came to an anchor off *Lymington*, where the convoy was detained by contrary winds until the 15th of *October*; and on the 17th, the sailing instructions were recalled, and the next day the ship returned to *Spithead*. The ports of *Portugal* were in the beginning of *November* shut against *British* ships by the *Portuguese* government, and continued shut until the *French* took possession of *Portugal* on the 30th of *November*; and from that time until and after the bringing of this action, *Portugal* has been occupied by the king's enemies, and the existing Government of the country has been at war with *Great Britain*. On the 26th of *December*, the plaintiff gave the following notice to the defendants: "I beg leave to confirm my notice to you of the 19th *Nov.*: and I hereby give you further notice to get out the *Mayflower's* cargo of coals at *Portsmouth*; and unless necessary proceedings are taken to that effect on or before the 31st instant, I shall give orders to land and warehouse the same at your risk and expence. The average account shall be made out without further delay, and I shall wait on you for your proportion thereof. I also herewith inform you, that I reserve to myself the right of proceeding against you at law for freight, demurrage," &c. On the 1st of *January* 1808, the defendants sent the following answer to the plaintiff: "If you land the coals by the *Mayflower*, you will take the consequences. We do not consent, if we are to be called upon for freight and expences." The cargo remained on board the vessel at *Portsmouth* until the 12th of *February* 1803, when it was landed by order of the plaintiff, after a previous notice given to the defendants. In *March* last, by consent of both parties, but without prejudice on either side, the coals were sold, and produced, after deducting the invoice price and all expences of unloading, landing, and warehousing, a neat profit of 166*l.* 18*s.* The question for the opinion of the Court was, Whether the plaintiff were entitled to recover a compensation for the part of the voyage which he had performed, and for the detention of his ship at *Portsmouth*? If he were not entitled to recover for either of these demands, a verdict was to be entered for the defendants.

Taddy, for the plaintiff, proposed two points for argument; first, whether the owner of the ship were entitled to freight *pro rata*, under the circumstances, for the part performance of the voyage from *Shields* to *Portsmouth*: and secondly, whether he were entitled to recover for demurrage during the stay of the ship at *Portsmouth*. 1st, On principles of natural justice the plaintiff is entitled to recover something; for he has loaded a cargo, and incurred expence and risk for the defendants. The objection, if any, can only arise upon the express contract in the charter-party excluding the implication of a promise founded upon natural justice: and that would be so, if the charter-party had provided for the case which has happened: but an unforeseen emergency has arisen, quite beside the case which was provided for by the charter-party beyond the controul, and without the default of either party; which has prevented the execution of the contract by making it illegal to carry the goods to a port occupied by the enemy. This made an end of the contract, and did not merely suspend its execution like a temporary embargo in our own ports until the further order of council, *Hadley v. Clarke*, 8 Term Rep. 259. This then brings the case within the principle of *Luke v. Lyde*, 2 Burr. 582, where an implied promise was raised on the ground of the labour performed for the benefit of the defendant in carrying his goods part of the voyage contracted for, in conformity with the rule of the marine law, which allows of freight *pro rata*. And this was not overruled by *Cook v. Jennings*, 7 Term Rep. 381.; for that was an action of covenant upon the charter party itself, and therefore the plaintiff was not entitled to recover any freight by the terms of the contract, without shewing complete performance of

the voyage contracted for. And in *Mulloy v. Backer*, 5 East, 316, the Court seemed inclined to support the principle of *Laue v. Lyde*.

LORD ELLENBOROUGH, C. J. That was upon the ground of there having been an acceptance of the cargo by the owner in the course of the voyage, which shewed his election to receive his goods at that place, instead of having them sent on to the place of their original destination: but the acceptance of the goods was the very substance of the new implied contract in *Laue v. Lyde*(1). But here there has been no agreement to accept the goods; but they were landed and sold without prejudice to either party. The case of *Laue v. Lyde* has been often pressed beyond its fair bearing; but the true sense of it has been explained by my brother *Lawrence* in *Cook v. Jennings*, and my brother *Le Blanc* in *Mulloy v. Backer*. Then what does this case amount to. The parties have entered into a special contract, by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract; and that event has not taken place; there has been no such delivery; and consequently the plaintiff is not entitled to recover: he should have provided in his contract for the emergency which has arisen.

Per Curiam,

Storks for the defendants.

Postea to the Defendants.

Atkinson v. Ritchie.

10 East, 580. Feb. 9, 1809.

The master and the freighter of a vessel of 400 tons having mutually agreed in writing, that the ship, being fitted for the voyage should proceed to *[St. Petersburg]*, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same, on being paid freight, &c.; held that the master after taking in at *St. P.* about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian Government was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted *bona fide*, and under a reasonable and well-grounded apprehension at the time; and a hostile embargo and seizure was in fact laid on six weeks afterwards.

THE plaintiff declared specially in *assumpsit* against the defendant for breach of an agreement, in not loading a complete cargo of hemp, under the same circumstances before set forth in the case of *Ritchie v. Atkinson*(a); with counts for money paid, and on an account stated: to which the defendant pleaded the general issue. And at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, a verdict was taken for the plaintiff for 2000*l.* damages, subject to an award as to their amount, and to the opinion of the Court upon a special case, stating all the circumstances set forth in the former report.

This case was argued in the last term by *Taddy* for the plaintiff, and by *Littledale* for the defendant. I was not present when it was argued; but I collected afterwards the substance of the arguments to be this.

For the plaintiff, the freighter, it was contended, that the contract not having been performed by the defendant, the master of the ship, it lay upon him to shew either a discharge by the plaintiff, from performance of it, or a competent excuse for non-performance. A contract is to be enforced according to its terms, where no general principle of law intervenes to prohibit the execution of it. The *vis major et casus fortuitus* of the civil law are not recognised by

(1) Vide editor's note to *Hunter v. Prinsep*, ante 395.

(a) Ante, 295. As the plaintiff in that case was the defendant here, and *vice versa*, in reading the facts there stated, the descriptions of plaintiff and defendant, as there applied, must here be reversed. And the present case concluded with stating (as before in p. 295.) that "The *Adelphi* arrived in London and delivered her cargo there to the plaintiff;" (the then defendant.) The remaining facts stated in the former case not being material to raise the question now made.

our law as excuses: the party may protect himself against these by express stipulation. For which *Paradine v. Jane*, All. 27., and *The Company of the Brecknock and Abergavenny Canal Navigation v. Pritchard*, 6 Term Rep. 750, were cited. There is no instance of an express contract qualified on the grounds of inevitable necessity or accident intervening to prevent the performance of it, if it be not illegal; as in the instance put in 1 Ld. Ray. 321. If the defendant meant to protect himself against the acts of the king's enemies, he should have so provided in his contract. And though the exception as to "*restraint of princes and rulers*" has been considered to be introduced into these contracts for the benefit of the master, according to *Blight v. Page*, before Lord *Kenyon*, cited in 3 Bos. & Pull. 295, and *Touteng v. Hubbard*, ib. 298.; yet according to the general rule of law in 10 Rep. 106. b. 3 Com. Dig. 334. Faits, E 8, and Plowd. 171, that every exception is to be construed strictly against the person for whose benefit it is introduced, the case in question is not within the exception: for this was no actual restraint; only an apprehension of it, an approximation to it; the restraint was not actually imposed on *British* ships till six weeks afterwards.

For the defendant, it was admitted that the terms of exception in the contract were not to be extended; but it was insisted that other necessary exceptions might be implied; and that it is a paramount duty imposed by law on the master to act for the benefit and safety of the ship, the crew, and the cargo, and still more to the state to which he belongs. He may throw the cargo overboard in case of distress; though that be only from the reasonable *apprehension* of danger. Molloy, 255. Upon a question between the owner of goods on board and the master, if the latter had remained after advice and reasonable warning of an expected embargo, which had afterwards taken place, by which the owners lost their goods, would not an action have lain against him? The master of the ship is agent for the freighter as well as for the owner. He has one duty, to take on board the cargo; and another paramount duty, to do the best he can for all concerned, and to preserve his ship and crew for the state as well as for the individuals concerned, to prevent them from falling into the hands of an enemy: and this was evidently a hostile embargo. In *Touteng v. Hubbard*, 3 Bos. & Pull. 301. Lord *Alvanley* lays down the principle, "that where the policy of the state intervenes, and prevents the performance of the contract, the party will be excused." It might under some circumstances be criminal in a master not to take reasonable warning to avoid an enemy. A party covenanting to build a house by a particular day was held to be excused from performance at the day, by reason that the plague was in the place; because he was not bound to risk his life for it. 1 Roll. Abr. 450. pl. 10. So here the jury have found that the master acted as he did under a reasonable and well grounded apprehension of a hostile seizure.

In reply; the argument derived from the marine law of *Jettison* was answered by stating, that it only applied to actual impending danger, and not to a distant apprehension of it. That though the captain might be deemed a general agent for the shipper; yet not so, where another agent was pointed out.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court. The question between the parties in this case arises upon an agreement in the nature of a charterparty. The parties are the merchant freighter on the one hand, and the master on the other; each contracting for himself with the other, as principals. Under such circumstances any constructive agency on the part of the defendant, in his character of master, for the plaintiff, as the freighter of goods, is wholly out of the question. Their relative claims upon, and duties in respect of, each other, are conclusively fixed and defined by the terms of their own written contract. No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon

it by implication, as an excuse for its non-performance. The rule laid down in the case of *Paradine v. Jane*, Alleyn 27, has been often recognized in courts of law, as a sound one: *i. e.* that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." And this has been recognized in several cases, as in *Bullock v. Dommitt*, 6 Term Rep. 650, and *The Company of proprietors of the Brecknock and Abergavenny Canal Navigation v. Pritchard and Others*, 6 Term Rep. 750(1). It has been contended that the exception contained in this contract, of "restraint of princes and rulers during the voyage," excuses the not taking on board a complete cargo in this case. But, without considering whether this provision respecting *restraint of Princes, &c.* be at all applicable by way of excuse for the non-performance of this part of the master's stipulated duty, *viz.* the taking on board a complete cargo; yet, at any rate, the *restraint* meant must be an actual and operative restraint, and not a merely expected and contingent one, as this at most only was. But, it has been further argued by the defendant's counsel, that supposing the master, in respect of his express contract, not to be otherwise justifiable in regard to the freighter; yet, that he is so, at any rate, on the ground of his paramount duty to the state; which required him to save the property and crew under his charge from the impending peril of an instantly expected embargo; and, that, in every private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the state is materially involved. That no contract can properly be carried into effect, which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law; are propositions which admit of no doubt. Neither can it be questioned, that, if from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect, without derogating from the clear public duty which a *British* subject owes to his sovereign and the state of which he is a member; the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject. But in order to found this new public duty, which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place: and that the danger to result to the public interests of his own country, from an observance of the contract, should be clear, immediate, and certain. In short, such a state of circumstances must be shewn to exist, as that the contract is no longer capable of being performed by him without a criminal compromise of his public duty. Can any thing of this kind be said, with truth, to exist in the present case? No actual change in the political relations of *Great Britain* and *Russia* had then taken place. The danger to result from remaining at *Cronstadt* was neither immediate nor certain: in point of fact, it attached only at the distance of many weeks afterwards. And no one can venture to suggest even in argument, that the loading in question might not have been completed without any criminal compromise of public duty. Indeed, to allow a man to withdraw himself from the performance of a distinct positive contract, upon the ground of some speculative inconvenience suggested as *likely* to result from such performance to the general interests of the state, would afford great encouragement to disingenuous subtleties and refinements upon subjects of this kind, and would render all reliance upon the solemn stipulations of parties in commercial matters pre-

(1) To which may be added the opinion of Lord *Alvanley* in *Touteng & al. v. Hubbard*, 3 Bos. & Pull. 300.

carious and insecure ; and which encouragement this court would most reluctantly lend its assistance to administer. For the reasons already given, such an argument has no foundation to rest upon in the present case. Therefore neither upon this ground, any more than upon the others already considered, is the plaintiff precluded from a right to recover. The consequence is, that the verdict for the plaintiff must stand, and the *postea* be delivered to the plaintiff.

Conway and Davidson v. Gray.

10 East, 526. Nov. 18, 1809.

A foreigner insuring in this country his ship or goods on a voyage is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own Government, and makes such embargo his own voluntary act. And goods having been consigned by such foreigner on his own account and risk to *British* merchants here, who, in consequence of such consignment, made advances to the foreigner, and made insurance upon the goods on his account ; debiting him with the premiums ; and the goods were afterwards abandoned in consequence of such embargo ; held that as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names as interest might appear ; however they might have insured their separate interests by a policy made on their own account.

THIS was an action against an underwriter on a policy of insurance, dated 25th of *January* 1808, effected in the names of the plaintiffs, on wheat and peas, as interest might appear, on board the ship *Swift* at and from *New-York* to *Liverpool*. The declaration stated, that whilst the vessel was at *New-York* with the goods on board, and before her departure from thence to *Liverpool*, she was and still is restrained by the government of the United States of *America* from proceeding on her voyage, and is still detained at *New-York* ; by means of which restraint the cargo on board is wholly lost. The first count charged the interest in the cargo to be in the plaintiffs jointly ; the second, in the plaintiff *Davidson* alone ; the third, in one *J. Townsend*. The defendant pleaded the general issue ; and at the trial at *Lancaster* a verdict was found for the plaintiffs, subject to the opinion of the Court on these facts.

The plaintiffs, *Conway* and *Davidson*, are *British* subjects, carrying on business as merchants in *Liverpool*, where *Conway* resides ; but *Davidson* has for some time past resided in *America*. The *Swift* belonged to a subject of the United States of *America*. In *November* and *December* 1807, *Townsend*, a resident citizen of the U. S. of *America*, and the person in whom the interest is averred in the third count, shipped a quantity of wheat and peas on board the *Swift* and two other vessels, and consigned the same to the plaintiffs, *Conway* and *Davidson*, at *Liverpool* : and the following bill of lading and invoice were made out, and duplicates thereof sent to the plaintiffs, and received by them. Bill of lading—" Shipped in good order, &c. by *J. Townsend*, a native citizen of the United States, in and upon the good ship the *Swift*, whereof is master, &c. — Price, now lying in the port of *New York*, and bound for *Liverpool*, to say, 4920 bushels of wheat, &c. being to be delivered in the like good order, at the aforesaid port of *Liverpool*, (the dangers of the seas only excepted :) unto Mess. *Conway* and *Davidson*, merchants there, or to their assigns, he or they paying freight for the said wheat, &c. at 1s. 8d. per bushel, &c. In witness," &c. (Dated at *New York*, 23d of *December* 1807, and signed by *I. Smith*, the purser). " Invoice of wheat and peas shipped by *J. Townsend*, a native citizen of the United States, on board the ship *Swift*, Capt. *Price*, bound for *Liverpool*, and consigned to Mess. *Conway* and *Davidson*, merchants there, for sales and returns on account and risk of the shipper." The particulars of the shipment are then specified, and the in-

voice signed at *New York*, 23d December 1807, by *J. Townsend*. Before the shipment of the wheat and peas, the plaintiff *Davidson* had agreed to grant *Townsend* an anticipation of 6000*l.* on account of the cargo, by bill on the plaintiffs *Conway* and *Davidson*: and accordingly, on the 7th of November 1807, *Townsend* drew on *Conway* and *Davidson* on account of the cargo three bills of exchange for 1000*l.* each, at three months date, and three other bills of exchange for 1000*l.* each, at four months date; which bills were accepted by *Conway* and *Davidson*, and when at maturity were duly paid in *England* by them. Part of the wheat and peas by one of the other vessels arrived in *England*, and was sold by *Conway* and *Davidson*, and the proceeds received by them: but on the whole transaction of the wheat and peas *Townsend* is still indebted to the plaintiffs in 2122*l.* 18*s.* 3*d.*, which is more than the sum insured. The wheat and peas in question were of greater value than the sum insured. *Townsend* is also indebted to the plaintiffs on the balance of their general account. The defendant subscribed the policy in question on the 25th of January 1808. The premiums of insurance on the wheat and peas were charged by the plaintiffs to the account of *Townsend*. On the 22d of December 1807, an act was passed by the U. S. of America for laying an embargo on all vessels in the ports and harbours of the U. S.; whereby the embargo was laid on all vessels in the ports and places within the jurisdiction of the U. S. cleared or not cleared, bound to any foreign port; and which directed that no clearance should be furnished to any vessel bound to any such foreign port, except vessels under the immediate direction of the President: with a proviso that nothing therein contained should prevent the departure of any foreign vessel, either in ballast, or with goods on board, when notified of that act. By virtue of this embargo, the vessel, which was at *New-York* in the U. S. of America with the cargo on board, was, on the 25th December 1807, when the embargo was first known there, detained and prevented from proceeding to *Liverpool*, and still continues so detained. The plaintiffs, when they heard of the detention, abandoned the vessel to the underwriters. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover upon any of the counts? in which case the verdict was to be entered for the plaintiffs accordingly: otherwise, a nonsuit was to be entered.

Conway and Davidson v. Forbes.

10 East, 539. Feb. 1809.

THIS was a similar action on another policy of insurance on cotton on board the same ship, laying the interest in the two first counts the same as in the other action, and in the third count in *A. Macomb*. The facts stated were in substance the same as in the former case. *Macomb*, by whom and on whose account and risk, the cottons were shipped, and consigned from America to the plaintiffs at *Liverpool*, being a resident American citizen, had agreed, in December 1807, with the plaintiff *Davidson*, who was then in America, to make such consignment; and *Davidson* agreed to grant him an anticipation of 7,500*l.* by bills on the plaintiff's house at *Liverpool* on account of the cotton, and which was the first transaction in trade between these parties. Six bills were accordingly drawn by *Davidson* himself on *Conway* and *Davidson*, to this amount in the whole, on the 22d of December 1807, at 5, 6, and 7 months, and the cotton was shipped and consigned to the plaintiffs at *Liverpool*, accompanied with a bill of lading and invoice; but the plaintiff's house afterwards refused to accept the two first sets of bills at 5 and 6 months, which were noted and returned to America; but when the two bills at 7 months, for 1000*l.* and 1500*l.* became due, they paid them to the holder, and their amount is still unpaid to the plaintiffs. This case also stated a letter

from *Davidson* to *Conway*, dated *New-York*, 23d of *December* 1807, the day after the act of the *American* legislature passed, stating the shipment of the cotton from *Macomb*, and the writer's expectation that the *Swift* would sail the next day; which letter was shewn to the underwriters at the time the policy was effected. This case further stated, in addition to the other, that information of the embargo arrived at *Liverpool* on the 26th of *January* 1808: but at that time the plaintiff *Conway* had received no information of the cotton being actually shipped at *New-York*: nor did he know of its being so shipped until the 11th of *February*, when he received such information in a letter from *Davidson*, directing him also to abandon to the underwriters; which he accordingly did on that day.

Maury v. Shedden.

10 East, 540. Feb. 1809.

THIS was another case depending upon the question of the *American* embargo, arising out of an action against an underwriter on a policy of insurance, stated in the first count to be dated the 22d of *January* 1808, on the ship *Georgia* at and from *Savannah* in *Georgia* to *Liverpool*, valued at 6000*l.* and declared and understood to be registered in the name of the plaintiff consul of the United States of *America* residing at *Liverpool*, who was the sole owner, and to be made against all risks whatsoever, *British* capture excepted, including any and every irregularity or want of papers, in case of capture or detention by any power whatever, *British* excepted.

This case stated, that the plaintiff was born in *America*, and resided there till the year 1786, when he came to reside at *Liverpool* as a merchant. In 1790, he was appointed, and has since continued consul of the United States of *America* at *Liverpool*. By the navigation laws of *America*, a privilege is allowed to its consuls residing in foreign countries to hold *American* ships or parts of such ships, notwithstanding their residence out of the U. S. a privilege not granted to any other description of its subjects, unless to a citizen of the U. S. residing abroad and having a partner and house of trade in the U. S., who is also a citizen. The plaintiff has had no house of trade in *America* since he left that country in 1786. He was sole owner of the ship *Georgia*, insured, which was an *American* vessel, and registered as stated in the policies. The case then stated, as before, the embargo act of the 22d of *December* 1807, and that the plaintiff, when he heard of the detention, abandoned the vessel to the underwriters. It also stated a letter of the 7th of *January* 1808, received on the 10th of *February*, by the plaintiff from his correspondent in *America*, stating that he had just received intelligence of the embargo, and that if it were confirmed, it would be best to bring the *Georgia* up to *Savannah Town*, and let her lie in safety. The *Georgia* was accordingly hauled up the river to the town by the plaintiff's agents.

These cases were all argued in *Michaelmas* term last, by *Littledale* for the plaintiffs, and by *Scarlett* for the defendants. And it was contended, that the underwriters were liable for the detention of the ship and goods under the embargo of the *American* government, though the respective owners of the property were *American* subjects; there being, as it was said, nothing against the laws or policy of this state in a foreigner insuring here against the acts of his own government; whatever question there might be as to the legality of an insurance by a subject of this country against loss by an embargo laid by our own government; the legality of which however was maintained, as it made no difference to the state on which of its subjects the loss fell. But supposing the Court to be of opinion that a foreigner could not claim to be indemnified against the acts of his own government; it was then contended for the plaintiffs in the two first actions, that as consignees of the goods, and having paid

a consideration for them up to the extent of the bills drawn upon and paid by them, they had a sufficient interest to entitle them to recover on those policies : and further, that *Davidson* had a sufficient interest to maintain the action as drawer of the bills in the second case which had been refused acceptance and had been returned protested to *America*, he being liable as drawer to pay the same. These were the principal points made in argument ; but it is unnecessary to detail the arguments, as the substance of them was stated by the Court in giving judgment. The cases referred to on the first point were *Rotch v. Edie*, 6 Term Rep. 413. *Kellner v. Le Mesurier*, (explained in *Laibock v. Potts*, 7 East, 451.) 4 East, 396. *Touteng v. Hubbard*, 3 Bos. & Pull. 291. and *Hadley v. Clarke*, 8 Term Rep. 259. On the second point, *Caldwell v. Ball*, 1 Term Rep. 205. *Hibbert v. Carter*, ib. 745. *Hill v. Secretan*, 1 Bos. & Pull. 315. *Wolfe v. Horncastle*, ib. 316. *Lucena v. Craufurd*, 3 Bos. & Pull. 103. and *Thompson v. Taylor*, 6 Term Rep. 478. ; and vide *Barker v. Blakes*, 9 East, 283.

Curia adv. vult.

LORD ELLENBOROUGH, C. J. now delivered the judgment of the Court in these several cases.

These were cases in each of which the plaintiffs claimed a right to abandon, in consequence of the *American* embargo in *December* 1807 ; and the main question in each was the same. The first was upon a policy on goods on board the *Swift*, at and from *New-York* to *Liverpool* ; and the interest was averred in one count to be in the plaintiffs jointly ; in another, in one of them only, i. e., *Thomas Davidson* ; and in a third, in *John Townsend*. *Townsend* was a resident citizen of *America*, and had consigned the goods to the plaintiffs for sale, on his (*Townsend's* account and risk. The plaintiffs, *Conway* and *Davidson*, are *British* subjects, carrying on business as merchants in partnership at *Liverpool* ; *Conway* residing at *Liverpool*, and *Davidson* having for some time past resided in *America*. The invoice and bill of lading are dated the 23d of *December* 1807. Before the shipment, *Davidson* had agreed to grant *Townsend* an anticipation of 6000*l.*, on account of these and certain other goods, by bills on the plaintiffs : and accordingly, on the 7th of *November* 1807, bills to that amount were drawn by *Townsend* on the plaintiffs, and these bills were accepted by *Davidson*, the partner of *Conway* in *America*, within a day or two after their date, and were paid when due by the plaintiffs. The plaintiffs have been reimbursed part of the amount of these bills ; but 2122*l.* 18*s.* 3*d.* is still due to them upon that transaction. This policy was subscribed on the 25th of *January* 1808 ; and the plaintiffs charged the premiums to *Townsend's* account. On the 22d of *December* 1807, an act was passed by the *American* government for laying an embargo on all ships and vessels in their ports. By this embargo this vessel was detained ; and as soon as they heard of the detention, the plaintiffs abandoned. It is stated, indeed, in the case of *Conway v. Gray*, that the plaintiffs abandoned the vessel ; and nothing is said as to the goods ; and as the insurance was on the goods, an abandonment of the vessel could give no claim ; but we presume that this is a mistake, and that the goods were abandoned.

In the second cause, (*Conway and Another v. Forbes*.) the facts are merely similar. The policy was upon goods in the same ship ; those goods were shipped by *Alexander Macomb*, a resident *American* citizen ; they were consigned to the plaintiffs, on *Macomb's* account and risk. *Davidson* agreed to grant *Macomb* an anticipation of 7500*l.* by bills on the plaintiffs, drawn by *Davidson* in *America* ; and the plaintiffs have paid 2500*l.* upon those bills. The bill of lading and invoice are dated at *New-York* the 24th of *December* 1807, and the policy is dated the 25th of *January* 1808. The plaintiffs charged the premium to *Macomb*.

In *Maury v. Shedden* the policy was upon ship valued at 6000*l.* : and the plaintiff, the *American* consul, who was then resident at *Liverpool*, was the

sole owner. Mr. Maury is a native of *America*, but came to reside at *Liverpool* as a merchant in 1786: and from the year 1790, has been the *American* consul there. The ship is an *American* vessel, and registered there under a privilege allowed by the navigation laws of *America* to their consuls.

Upon each of these cases this question arises; 1st, Whether the *American* embargo will warrant an abandonment by or on behalf of an *American* subject; and if not, then a second question arises in the 1st and second causes; Whether *Conway* and *Davidson* as consignees of the goods being in advance to the consignors and under acceptances for them, have a right to apply the policies to their own interests, as such, and to abandon on that account. As to the first; in all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own Government; and on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject, in a *British* court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. This seems to be established by *Touteng v. Hubbard*, 3 Bos. & Pull. 291. That was an action by the owners of a *Swedish* vessel against a *British* subject, for not supplying the vessel with a cargo at *St. Michael's*. The sailing of the ship from this kingdom had been prevented a considerable time, and until it was too late for the fruit season at *St. Michael's* by an embargo here upon *Swedish* vessels. That embargo was in the nature of reprisals for what were considered acts of aggression by the *Swedish* Government. The court was of opinion, that if that had not been the case of a *Swede*, against a *British* subject, the plaintiff would have been entitled to recover; but as the embargo was produced by acts of the *Swedish* Government, and every *Swede* was to be considered a party to those acts, it was in effect the plaintiff's own fault that his vessel was detained; and then the loss which resulted from it was one he ought himself to bear. He was bound to proceed with all convenient speed; the acts of his Government led to his being prevented; he was considered as a party to those acts: and was therefore looked upon as having failed in his part of the contract, viz. to sail with all convenient speed. In the cases now before the Court, the foundation of the abandonment is an act of the *American* Government: every *American* subject is to be considered as a party to that act; it has, virtually, the concurrence and consent of all, and amongst the rest the concurrence and consent of the assured in these cases: the assured therefore have joined in a resolution, that the ship in question shall not be allowed to sail, but shall remain in their ports: and is it possible for them afterwards to make their not sailing the foundation of an action? The party who himself prevents the act from being done has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done(1)*. Where the insured and insurer are both subjects of the same state, the case will stand upon very different grounds of consideration(2).

(1) In a later case it was attempted to extend this doctrine of an implied responsibility on the part of a foreign subject for the acts of his own government to the case of a foreign subject domiciled in *England*, and licensed to trade by the *British* Government; but the Court held, that for the purpose of such licensed trading, the person licensed was to be regarded as a *British* subject. *Uparica v. Noble*, 18 East. 382. In this country, the doctrine in question has never been recognized: it being considered by our Courts as too refined and fanciful to be safely applied to the common transactions between man and man. 2 Hall's American Law Journ. 230. 5 Johns. Rep. 218.

* [But see the subsequent decisions of Ld. Ellenborough in *Simeon v. Bazett*. 2 M. & S. 94. which seems, in principle, to overrule that in the text. See also contra. *Francis v. Ocean Ins. Co.* 6 Cowen 404. This case was affirmed upon writ of Error, see 2 Wend. 64. and is presumed to be the law of New-York.—W.]

(2) For decisions in cases of insurance where the restraint was imposed by the government of the country to which both parties belonged, see the editor's notes to *Touteng & al. v. Hubbard*, 3 Bos. & Pull. 301, 2. (Day's edit.)

As to the second question ; Whether the consignees have not a right to apply the policies to their own interests, and to abandon on that account ; we are of opinion that they have not. It might perhaps be difficult to make out that they had such an interest as was capable of abandonment ; because they were to have no controul over the goods but upon their arrival in *England*. And it may also be very questionable whether any policy, which is effected clearly to cover the interest of the consignor, can be applied to protect the interest of the consignee. But the particular ground of our decision is this, that where a policy is effected on behalf of the consignor, and the conduct of the consignor, or of the state to which he belongs, has taken away from him the right of enforcing it directly and effectually for his own benefit, the consignee is not at liberty to apply it to his interest, and enforce payment as though it had been made on his account. We do not say a consignee may not insure ; we only say, that he is so far identified in interest and right with his consignor, as not to be able to apply with effect to his own interest, which is derived out of that of the consignor, an insurance which was effected in order to cover the interest of the consignor ; but which, upon the principle already stated, cannot be available for that purpose. The underwriter has an implied pledge from the assured, that he will do no act to obstruct the voyage ; and when that pledge is broken by the person on whose account the insurance was made, can another person, who has paid no premium out of his own pocket, step in to take the benefit of that insurance, merely because his dealings with the assured would have enabled him to have insured in his own name ? There is no case which decides that he can, and it would be gross injustice that he should. *Wolfe v. Horncastle*, 1 Bos. & Pull. 316, which was cited in the argument, goes no such length. In that case, the plaintiffs had effected a policy to cover the interest of one *Lund* in a cargo, and had advanced 300*l*. on the credit of that cargo : the main question was, Whether the policy were so effected as to cover *Lund's* interest : and if it were not, then it was contended that it might be applied to cover that interest which the plaintiffs had acquired by their advance of the 300*l*. The Court were unanimous, that the policy was so effected as to cover *Lund's* interest ; so that a decision upon the other point was unnecessary ; but they intimated a clear opinion upon that point, that the plaintiffs had an insurable interest : and they seem to have thought the policy might have been applied to it, if it could not have been applied to *Lund's*. How does that case, however, bear upon this ? *Lund* had done no act to forfeit his right upon the policy ; and if he could not have recovered, it would have been merely because the policy was not effected so as to be capable of covering his interest ; the only objection made to *Lund's* interest being, that *Wolfe* had made the insurance without orders or authority from *Lund* : and then if it could not apply to the 300*l*. the plaintiffs had advanced, it would have been applicable to nothing. Here the policies were effected, so as to be capable of covering the consignors' interest, and for the express purpose of doing so : they are applicable to *that* ; and the consignors have forfeited their rights by the act of their Government. The case of *Wolfe v. Horncastle*, therefore, concludes nothing in favour of these plaintiffs. In truth, in that case had the plaintiffs been allowed to recover upon their own interest, on account of the advance they had made, it would in substance have been suffering *Lund* to recover *pro tanto* ; because then they could not have resorted to him for reimbursement : and in these cases, if *Conway* and *Davidson* were allowed to recover in respect of their advances, it would in substance be suffering the *American* consignors to recover *pro tanto*, because it would wipe off the claim which *Conway* and *Davidson* have upon them. In *Wolfe v. Horncastle* it would have been in furtherance of justice, because *Lund* had done nothing to forfeit his claim upon the policy : in this case, it would be against justice, because these *American* consignors have done

that by which their claim is precluded. For these reasons we are of opinion, that in each of these cases the postea must be delivered to the defendant.

Doe, on the demise of Hardwicke v. Hardwicke.

10 East, 549. Feb. 9, 1809.

Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock including, as to six of the estates, 3 several lives in succession on each estate, and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power "to add another life or lives to make 3 in like manner as after-mentioned, for other persons to do the same:" and then giving this general power, "that when and so often as the lives on either of the estates before given shall be by death reduced to two, that then it shall be in the power of the person or persons, then enjoying the said estate or estates to renew the same with the person or persons to whom the revenue thereof shall belong, by adding a third life in such estate, and paying such rever-sioner two years purchase for such renewal; and also to exchange either of the said two lives on payment of one year's purchase:" Held that this power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life.

THIS case was argued in *Michaelmas* term last, by *Abbott* for the plaintiff, and *Jervis* for the defendant. The argument turned wholly on the intention of the testator to be collected from the particular provisions of a very perplexed will. And after consideration,

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This was an ejectment for premises at *Tytherington* in the county of *Gloucester*; and both parties claimed under the will of *Dr. Peter Hardwicke*; the lessor of the plaintiff under a residuary clause in the will; and the defendant under a lease, which he insists was warranted by a power which the will contains: and the case depends upon the validity of that lease. *Dr. Hardwicke* by his will devised part of his estates (not now in question) to trustees, in trust to sell and pay debts and legacies; and subject thereto, he devised part of it to his nephew *James Hardwicke* for life: with remainder to his first and other sons in strict settlement; with several remainders over. The testator then devises seven different estates, the last of which is the estate in question. The first he devised to his nephew *Samuel* for life; remainder to *Samuel's* wife for life; remainder to all and every his children for their respective lives. The next he devised to his nephew *James* for life; remainder to *James's* sister *Elizabeth* for life: and power is given to them "to add or declare another life "or lives to make three, in like manner as after mentioned for other persons "to do the same." The third estate he gives to trustees during the lives of his brother *Joseph* and his four children, in trust to pay a moiety of the rents to *Joseph* for life, and the other to his children, and upon *Joseph's* death to pay the whole to the children. The fourth estate he gives to his nephew *George* for life; remainder to *George's* wife for life; remainder to all and every the children of *George* for their lives. The fifth estate he gives to his niece *Rachel* (wife of *Daniel Ludlow*) for life; remainder to her son for life. The sixth estate he gives to his brother *Benjamin* for life; remainder to *Benjamin's* wife for life; remainder to all and every his children for their respective lives. And the seventh estate he gives to his sister *Rachel Shellard* for life; remainder to her husband for life; remainder to their children *Edward*, *Thomas*, and *Mary*, for their respective lives. He then gave power to *Mrs. Shellard*, his brother *Benjamin*, and his nephews *Samuel* and *George*, to direct which of their children should have priority of enjoyment. After which follows the power upon which the case arises, which is in these words. "And my will further is, that when and as often as the lives on any or either of my estates before given to my said sister, brothers, and nephews shall be by death reduced to two, that then it shall be in the power of the person or persons then enjoying the said estate or

estates to renew the same with the person or persons to whom the revenue thereof shall belong and appertain, *by adding a third life in such estate*, and paying such reverser after the rate of two years' purchase for such renewal: *and also to exchange either of the said two lives* on payment of one year's purchase for such exchange." The testator then limits the residue of his estate to his nephew *James* and his first and other sons in strict settlement; remainder to his nephew *Samuel* and his first and other sons in strict settlement; remainder to his brother *Joseph* for life; remainder to *Joseph's* first and second sons, *John* and *Peter*, successively, and their first and other sons in strict settlement: remainder to *Joseph's* other sons in tail male; with divers remainders over. And he assigns as a reason for preferring his nephew *James* to his nephew *Samuel*, that *James's* father had had great trouble in purchasing for him part of the estate devised. By a codicil the testator provides, "that no wife of any of his brothers or nephews should have power to add or exchange any second husband as a third life." These seem to be material parts of the will and codicil.

On the 1st of *December* 1766, the lives upon the 7th estate (that given to the *Shellards*) were reduced to two; and *George Hardwicke* being the person then enjoying that estate, he procured the addition of a third life. The additional life soon afterwards died; and on the 21st of *December* 1770, *George Hardwicke*, being still the person enjoying the estate, procured the addition of another life. Each of these lives were put in by *Joseph Hardwicke*, who was become entitled to the reversion for life. *Joseph Hardwicke* is since dead, and the lives are reduced to the last additional one he put in; so that unless the lease by which he put in that life is warranted by the power, the lessor of the plaintiff is entitled to recover. For the plaintiff it is contended, that the power warrants only one renewal, and one exchange of a life, in respect of each estate: for the defendant, that it warrants repeated renewals, and repeated exchanges of a life, from time to time, whenever the number of lives on each estate is reduced to two. It is observable, that the estates for life given by this will are not estates *pur autre vie*, but *estates for life given to several persons successively*; and the exchange of a life, or the addition of a life to be made when the lives on the estates so given shall be reduced to two, must be in the same manner; that is, the life of a person to enjoy the estate for his or her respective life, not of a life to be put in, during the continuance of which any other person to whom a life estate is limited, or his or her assigns, shall enjoy the estate: so that there seems no reason why the testator should give a perpetual right of such nomination to persons who must be strangers to him. The right of once naming a new life, and of exchanging an old life for a new one, might be with a view of enabling a brother or nephew to provide for a second wife, or to provide for a wife which any of the sons of his brother, sister or nephew, might happen to marry: and the clause in the testator's codicil seems to favour such a construction; by which he declares, that no wife of any of his brothers or nephews should have power to add or exchange any second husband as a third life. This shews the testator's anxiety to exclude any stranger from the enjoyment of his estate; and also shews his intention that the life to be added should be that of a person by whom the estate was to be enjoyed by him or her, personally, during life: for if his intention had been to enable the person enjoying his estate to renew, by taking a lease to himself and his assigns during the life of a nominee: there could be no good reason why that nominee, or *cestui que vie*, should not be a second husband of a brother's or nephew's wife. Another argument for confining the power of renewal to one time only arises from the language used by the testator in the clause giving that power to his nephew *James* and *James's* sister *Elizabeth*, in respect of the estate given to them. The testator has devised an estate to his nephew *James* for life; remainder to *James's* sister *Elizabeth* for life: with a power to *them* to add or declare another life or lives to make

three, in like manner as after mentioned for other persons to do the same. These latter words assimilate the power given in this instance to the power given to the devises of the other estates: with this only difference, that inasmuch as in the devises of the other estates, the limitation being to more persons than two for successive life estates, the power of renewal is given only when those life estates shall be reduced to two: but this estate being given originally to two only, to take successive life estates, the power of nominating a third life is given to them immediately; but it is only given personally to them, and can only by the very terms of the power be exercised once: and no reason can be assigned why the power, professedly given to be exercised *in like manner*, should be exercised in a different manner. The argument in favour of a perpetual right of renewal, which pressed most strongly, was drawn from the words, *when and as often*; which it was said could not be satisfied but by a perpetual right of renewal, whenever the number of lives on each estate so given should be reduced to two. It appears, however, to us, that those words do not require such extensive construction: and that the words, *as often*, more properly relate to the several occasions of the lives on the several estates being reduced to two: inasmuch as there being more estates than one where the lives will be reduced to two, that event will happen more than once; respect being had to the several different estates. The defendant, therefore, claiming to hold in virtue of a second added life; all the original lives, and one added life being spent; we are of opinion, that the addition of such second life was not warranted by the power, and that the plaintiff is entitled to recover.

Postea to the Plaintiff.

Havelock v. Geddes and Others.

10 East, 555. Feb. 9, 1809.

1. A covenant in a charter-party of affreightment, that the owner shall at his expense *forthwith* make the ship tight and strong &c. for a voyage for 12 months &c. and keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service and used her for a certain period: but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action.
2. A ship having been let to freight for 12 months, and for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10 and 14 months, &c. it is no answer to a breach, for non-payment of 6 months' freight due at the end of the 10 months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped goods on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months; and that he had paid the freight for all the time she was serviceable; and that she was not in his service for 10 months in the whole: for *non constat* but that after she had been used by the freighter, she wanted repair without any default of the owner, or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair.
3. The freight being reserved at so much *per month*, was earned at the end of each month, although the stipulated times of payment were from 4 months to 4 months, and the ship were lost before the end of 14 months.
4. An allowance for extra men being covenanted to be paid by the freighter, the residue of which, (after part payment) was not to be paid *till the ship's discharge or return from her voyage*, and the ship having sailed on a voyage to *St. Domingo*, where she arrived, but was burnt before her return; held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter: on which such extra allowance became payable.

THIS was covenant upon a charter-party of affreightment, dated 5th of September 1806, whereby the plaintiff, owner of the ship *Lord Duncan*, of 933 tons burthen, of which *A. Heartley* was master, let her to freight to the

defendants, for 12 calendar months certain from the 24th of *September* 1806, and from thence for such longer period, if any, as the defendants should think fit to keep and retain the same, upon the conditions and covenants therein-after contained. And the plaintiff covenanted that the ship should be navigated and furnished with 50 persons, and such further number, not exceeding 100, as should be required by the defendants; the owner being reimbursed by the freighters for such additional number according to the average rate of wages and provisions expended on the whole. That the ship, during the time she should be navigated and employed under the charter-party, should be under the entire controul of the defendants, so far as related to all orders for sailing, destination and delay. And the defendants covenanted to pay to the owner, for the hire and service of the ship for the said term of 12 calendar months, and such longer period as they should keep the same, the freight and rate following, viz. 24s. per calendar month per ton, being 1119l. 12s. per month, commencing from the 24th of *September* 1806, and ending when the ship should return to the river Thames, and there by the freighters declared to be discharged: it being understood that the freighters should not be at liberty to discharge the ship abroad, although she might be abroad at the expiration of the said 12 calendar months, or at any other place but within the port of *London*. And that the freight should be paid in the proportions and at the periods following. viz. 2 months freight at the execution of the charter-party either in cash or by accepted bills of the freighters at 3 months from the said 24th of *September*; 2 months more at the end of 6 calendar months from the said 24th of *September*; 2 months more at the end of 10 calendar months; 2 months more at the end of 14 calendar months, should the ship be so long employed; and in like manner, 2 months more at the end of every succeeding 2 calendar months, until the ship should be discharged, and immediately upon such discharge, the balance to be paid by the freighters in cash, or their acceptances at 3 months. That the freighters should pay all port charges, tonnage duties, dock dues, and all other duties and dues, except lights and pilotage, which were to be paid by the owner. That they would reimburse to the owner the charges for additional men beyond 50 as before mentioned; two calendar months allowance for such additional men to be added to the first payment of freight; but the residue of such allowance not to be paid until the ship's discharge, or return from her first intended voyage; and in like manner for any other foreign voyage or voyages. By virtue of which charter-party the defendants, on the said 24th of *September*, took the ship into their service, and kept and retained the same therein, until she was afterwards, and whilst she was so in their service, and after the expiration of 10, but before the expiration of 12 months from the same 24th of *September*, viz. on the 22d of *August* 1807, at *St. Domingo*, without any default of the owner, master, or mariners, consumed by fire and wholly lost, and was thereby prevented from returning to *London*. And then the plaintiff, after averring that the ship, during all the time she was so kept and detained in the service of the defendants, was navigated and furnished with 50 persons, and such further number, not exceeding 100, as was required by the defendants; and was during all that time under the entire controul of the defendants as to all orders for sailing, destination, and delay; assigned three breaches; 1. That though the defendants paid the plaintiff the two months freight payable at the execution of the charter-party, and also the 2 months freight at the end of the first 6 calendar months; yet they did not pay the two months freight at the end of the said 10 calendar months. 2. That the defendants have not paid to the plaintiff any subsequent freight. 3. That although on the 24th of *October* 1806, the defendants required the plaintiff to put on board, and he did put on board, 20 additional men beyond the 50, who all sailed in the ship on a foreign voyage to *St. Domingo*, and continued on board from thence until the loss of the ship; and although according to the average rate of wages and provisions expended on the whole, the defendants became liable to pay to the plaintiff 8l.

per month for every such additional man; yet the defendants had not reimbursed the plaintiff for any of them.

The defendants cravedoyer of the charter-party, by which it appeared further, that the plaintiff covenanted that the ship, at his expence, should be *forthwith made tight and strong*, and well and sufficiently equipped, manned, and fitted, &c. *for a voyage or voyages* of 12 calendar months to foreign parts; and should *during the continuance of the charter-party be kept* tight and strong, and well and sufficiently equipped, &c. and virtualled; concluding with a mutual general covenant for performance: and particularly, the plaintiff binding to the defendants the said ship, freight, tackle, &c., (the perils and dangers of the seas, rivers, &c., all inevitable accidents, whatever, and capture by enemies, and the detention and restraint of rulers, &c. being excepted: and the defendants binding to the plaintiff the goods put on board the ship. The defendants then pleaded, 1. *non est factum*. 2dly, That the ship was not at the expence of the plaintiff *forthwith*, or within a reasonable time after the charter-party, made tight and strong, and well and sufficiently equipped, &c. for a voyage or voyages of 12 calendar months to foreign parts; whereby she was delayed and hindered from proceeding on a voyage from *London to St. Domingo*, and was detained on her said voyage at *Portsmouth* for an unreasonable length of time, *viz.* for 4 months, during all which time the defendants lost the use and benefit of the ship, and were put to great expence in repairing her and making her tight and strong, and fitting her for such voyage; and also, that thereby certain goods of the defendants on board the ship were wetted and damaged; wherefore they pray judgment of the plaintiff's action. 3dly, the defendants pleaded as to the first breach, that during the 12 calendar months therein mentioned, *viz.* on the 1st of *November 1806*, certain goods of the defendants were shipped on board the vessel to be carried from *London to St. Domingo*; and that *at the time of shipping* them the vessel was not tight and strong, and well and sufficiently equipped, &c., but was decayed, leaky, defectively provided, and in an unseaworthy state for performing the said voyage; in consequence whereof it became necessary to unload and repair her, and she was afterwards unloaded and repaired before she could proceed on and perform her said voyage: and by means of the premises the ship was *unemployed by and wholly unserviceable to the defendants for a great part of the six calendar months* from the 24th of *September 1806*, *viz.* for 4 calendar months part thereof. And then the defendants averred, that they paid to the plaintiff for the hire and service of the ship for the residue of the said 6 calendar months the freight in the charter-party mentioned. The fourth plea was the same in substance as the last; omitting only to state that the defendants paid for all the time the ship was not wholly unserviceable to them or unemployed: and it avers, that the ship *was not in the actual service and employ of the defendants, or retained in such service under the charter-party, for 10 calendar months in the whole from the 24th of September 1806 until she was consumed by fire as in the declaration mentioned, and which fire happened without any default in the defendants.* 7thly, The defendants pleaded (to the second breach) that the ship after the charter-party made *was not employed by them or in their service until the end of 14 calendar months* from the said 24th of *September 1806*; but while she continued in their service and employ, and before the end of 14 calendar months, &c. *viz.* on the 22d of *August 1807*, in parts beyond the seas near *St. Domingo*, the ship, without any default of the defendants, was consumed by fire and wholly lost. 8thly, (as to the last breach,) That the defendants did reimburse to the plaintiff two calendar months allowance for the additional men beyond 50 put on board, &c.; and further, that after making the charter-party, the ship sailed on a voyage from *London towards St. Domingo, being her first intended voyage outwards* under the charter-party with a cargo of goods of the defendants' on board; and that afterwards, on the 22d

of *August 1807, in parts beyond the seas near St. Domingo, the ship was, without default of the defendants, burnt and wholly lost, and never did return from St. Domingo aforesaid.*

The plaintiff in his replication demurred to the 2d, 3d, and 4th pleas, and assigned for special causes of demurrer, that the defendants in each of those pleas had attempted to put in issue immaterial facts, and had insisted on divers covenants of the plaintiff as conditions precedent to the performance of their own covenant; whereas they were separate and independent covenants: and the breaches of covenants alleged against the plaintiff in these pleas were no answer to or justification of the breaches of covenant of which the plaintiff complains. To the 7th plea the plaintiff replied, that the defendants, after making the charter-party, viz. on the 18th of *November 1806*, dispatched the ship with a cargo on a voyage to the island of *St. Domingo*; and that the ship afterwards, and after the expiration of 7 calendar months from the said 24th of *September 1806*, and before she was so burnt and wholly lost, viz. on the 4th of *May 1807*, arrived at *St. Domingo*, and delivered her cargo, and completed the said voyage. As to so much of the 8th plea as relates to the two calendar months allowance for the additional men, the plaintiff took issue on the reimbursement of such allowance. And as to the residue of the plea he replied, that before the ship was consumed by fire, to wit, on the 20th of *August 1807*, the ship had arrived at *St. Domingo* and completed the said intended voyage.

The defendants joined in demurrer on the 2d, 3d, and 4th pleas; and demurred generally to the replications to the 7th and the latter part of the 8th pleas: on which there was also joinder in demurrer.

This case was argued on a former day in the term, by *Gascoe* for the plaintiff, and *Marryat* for the defendants. The questions made upon the demurrer to the 2d, 3d, and 4th pleas were, whether the agreement in the charter-party that the ship should be made tight and strong, &c. were a condition precedent to the payment of any freight; and whether the matters alleged in those pleas were an answer to the action on the breach of covenant for non-payment of the freight; or were the ground of a cross action against the plaintiff for damages. The next question arose upon the demurrer to the replication to the 7th plea, whether the ship not having returned from her voyage to *St. Domingo* back to the river *Thames*, and been there discharged, but having been burnt abroad before the end of 14 calendar months from the date of the charter-party, after she had completed her outward voyage to *St. Domingo* (which was completed after the end of 7 calendar months;) the owner were entitled to any part of the freight accruing after the expiration of six calendar months; which is what he claimed upon the second breach of covenant. The last question arose upon the demurrer to the replication to the latter part of the 8th plea: whether the ship having been so burnt at *St. Domingo*, and not discharged in the river *Thames*, or returned from her first intended voyage; the plaintiff were entitled to any part of the extra allowance claimed by the last breach of covenant beyond the part payment made in the first instance. The substance of the arguments on these points were afterwards fully stated by the Court in giving judgment. And after time taken to consider.

Lord ELLENBOROUGH, C. J. now delivered judgment, (after stating the declaration as before set forth.)

The defendant cravedoyer of the charter-party, by which it appeared that the plaintiff covenanted that the ship, at his expence, should *forthwith* be made tight, staunch, and strong, and well and sufficiently equipped, maned, &c. for a voyage or voyages of 12 calendar months, and should, during the continuance of the charter-party, be kept tight, staunch, &c. and well and sufficiently equipped, manned, &c. and it is upon this covenant, that the defendants have grounded several of their pleas. The first plea, upon which any question arises, states, that the ship was not forthwith after making the charter-party

made tight, staunch, &c. and well and sufficiently equipped for a voyage or voyages of 12 calendar months; *per quod* she was hindered from proceeding on a certain voyage from *London* to *St. Domingo*, and detained an unreasonable length of time; during all which time the defendants were deprived of the use of the ship, and were put to great expence in making her tight, staunch, &c. and fitting her for her voyage, and divers goods of the defendants which were put on board her, were wetted and damaged. To this plea, which is pleaded to the whole of the demand, the plaintiff has demurred, and the question upon it is, Whether the defendants are entitled to insist that the *forthwith* making the ship tight, staunch, &c. was a condition precedent. The defendants did not repudiate the ship, because she was not immediately made tight, staunch, &c., but took her into their service and employed her; and after having navigated her for several months, they say that, because this was a condition precedent, and was not performed, they are not liable to pay any thing. They do not pretend that the non-performance has damnified them to the extent of the payment they wish to evade: and to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, &c., would be a breach of the condition, and a defence to the whole of the plaintiff's demand. We are clear, however, that the defendants, who took the ship into their service, and employed her in an unimpaired state, have no right to insist that the *forthwith making her tight, &c.* was a condition precedent. Whether a particular covenant is to constitute a condition precedent depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained, as is laid down in *Porter v. Shepherd*, 6 Term Rep. 663, and in *Glazebrook v. Woodrow*, 8 Term Rep. 370, 371. And it would be an outrage to common sense to say, that it could have been the intention of these parties, that if the defendants took to this ship, as a ship in their employ under the charter-party, they should be at liberty afterwards to insist that the making her complete in every particular, and that forthwith, without any delay, was a strict condition precedent on the part of the plaintiff. The cases cited are also decisive upon the point, *Constable v. Cloberie*, Palm. 397, shews that a covenant to sail with the first wind is not a condition precedent. *Bornman v. Tooke*, 1 Campb. 377, proceeds upon the same principle. *Boone v. Eyre*, 1 H. Blac. 273, in the notes, lays down a very sensible general rule, that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other: but where they go only to a part, and a breach may be paid for in damages; there the defendant has a remedy on the covenant, and shall not plead it as a condition precedent(1). Had the plaintiff's neglect here precluded the defendants from making *any* use of the vessel, it would have gone to the *whole* consideration, and might have been insisted upon as an entire bar; because the consideration for the defendants' covenant to pay the freight would then have failed *in toto*; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a *part* only: the consideration has not *wholly* failed; and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right, under a counter action, to such damages as they can prove they have sustained from this neglect. For these reasons, we are of opinion that this plea cannot be supported, and that the demurrer to it must be allowed.

The next plea submitted to the consideration of the Court is pleaded to the first breach only. It states that during the 12 months mentioned in the charter-party divers goods were shipped on board the vessel, to be carried from *London* to *St. Domingo*; that at the time of shipping them 'the vessel was

(1) Vide *Davidson v. Gynne*, 12 East. 351, 359. *Bennet v. Executors of Pixley*, 7 Johns. 249.

not tight, staunch, &c. and sufficiently equipped, &c., but on the contrary was decayed, leaky, ill fitted, and in an unseaworthy state; that in consequence thereof, it became necessary to unload and repair the ship; that by means of the premises, the ship became unemployed by and unserviceable to the defendants for a great part of six calendar months; and that the defendants have paid for the hire and service of the ship for the residue of the said six calendar months. There is another plea similar to this, except that it does not state that the defendants paid for all the time the ship was not unserviceable to them, or unemployed: and it avers that the ship was not in their service or employ for 10 calendar months in the whole. To these pleas the plaintiff has also demurred, and the question upon them is, whether the defendants have shewn such a neglect in the plaintiff, as will excuse them from the payment of the freight which the first breach claims. These pleas are founded, not upon the stipulation *forthwith to make* the vessel tight, staunch, &c., but upon the stipulation to *keep* it so; and it is not alleged that there was any defect at the commencement of the 12 months for which the vessel was hired: but that *at the time of shipping the goods* during the 12 months she was not tight, &c. It is therefore perfectly consistent with the allegations in these pleas, that the ship had been put into a perfect state, and thoroughly equipped, immediately after the execution of the charter-party: that she was so when the defendants took her into their service: but that she became otherwise, (which might be from one of the accidents to which all vessels are subject,) whilst in the defendants' employ. It is indeed consistent with these pleas, that the vessel might have performed a voyage for the defendants before this defect occurred: and as it is a general rule that pleas are to be taken most strongly against the party pleading them; inasmuch as it is probable he would state his case as favourably for himself as the facts would permit; we should be warranted in assuming this to be the case. The pleas do not state that there was any delay in making the repairs, or that it was through any default in the plaintiff that the defect had occurred. The question then is, whether, because the plaintiff has undertaken to keep the vessel tight, &c., the defendants have a right to deduct any thing out of the freight they are to pay, in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired? And we are of opinion they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charter-party is, that whilst those repairs are going on, the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments. As these pleas therefore do not shew that it was owing to any default in the plaintiff, that the defect in the ship occurred, or that there was any delay in repairing it; we are of opinion that no deduction is to be made from the freight on that account; that these pleas therefore are bad, and that the demurrer to them must be allowed.

The next plea, upon which a question arises, is pleaded to the second breach, (which claims freight beyond the expiration of six calendar months,) and this plea is, that the vessel was not in the service or employ of the defendants until the end of 14 calendar months, but within that time was, without any default in the defendants, consumed by fire. To this the plaintiff has replied, that the vessel sailed for *St. Domingo*, delivered a cargo there after the end of seven calendar months, and was not burnt till afterwards. To this replication there is a demurrer; and the defendants contend that the stipulations in the charter-party, which fix the times for paying the freight, make the right to the portions of freight payable at those times depend upon the *then* safety of the ship: and that the loss of the vessel before any one of those

periods destroys the right, except for such freight as was previously payable. That a loss, for instance, after the end of six months, but before the end of 10, would have precluded the plaintiff from claiming more in the whole than four months freight: and that a loss after 10 months, and within 14, would have confined the plaintiff to six months freight. It is to be remembered, however, that the charter-party stipulates that the defendants should pay a given freight *per calendar month*; and the times fixed for its actual payment can only be considered as postponing, for the defendants' convenience, the actual payment of a sum then due to a future period; not as creating a contingency whether it should ever be paid at all. Each month's freight therefore was earned; and it was nothing but the actual payment that was postponed. We are therefore of opinion that this plea is also bad, and that the demurrer to the plaintiff's replication must be over-ruled.

The last question arises upon the last breach, which is for the allowance of the extra men; of that allowance two months was to be added to the first payment for freight, and the residue was not to be paid till the *ship's discharge or return* from her first intended voyage, and in like manner for any other foreign voyage or voyages. The defendant's plea to this breach is, as to the first two months allowance, payment; and as to the residue, that the ship sailed upon a voyage to *St. Domingo*, and was burnt and lost before her return. The plaintiff has taken issue upon the payment; and as to the residue has replied, that the ship arrived at *St. Domingo*, and completed that voyage. To this there is a demurrer: and the defendants insist, that as the ship *never was discharged and never returned*, nothing beyond the first two months allowance became payable. But we are of opinion, that the destruction and loss of the vessel was, within the true intent and meaning of this charter-party, a discharge of the vessel from the further prosecution of the adventure and employment in which she was engaged: and that upon that event, the residue of extra allowance became payable, as if the discharge had taken place by the act of the defendants themselves: and that the defendants must be understood to have discharged the vessel when they could by no possibility any longer employ her. We are therefore of opinion in favour of the plaintiff upon each of the several points raised by these pleadings(1).

Judgment for the Plaintiff.

The King v. Rogers.

10 East, 566. Feb. 9, 1809.

The stat. 42 G. 3, forbids corn making into malt, to be wetted while it is a-floor before 12 days from the time when it is emptied out of the cistern. The stat. 46 G. 3. s. 1, repeals that provision generally, and enacts, (s. 3.) that the corn in that state shall not be wetted till 9 days, &c. after the 1st of August 1806. Then s. 14, enacts, that *this act* shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st of August 1806, and shall continue in force till the 25th of March 1807. Held that incorporating the 14th with the 1st section, this law only operated as a repeal of the former one during the time limited in the 14th section, after which the first resumed its operation during the interval between the 25th of March 1807, and a subsequent act reviving and continuing the 46 Geo. 3.

THIS was a conviction upon the stat. 42 Geo. 3. c. 38. s. 30, in the penalty of 200l. (mitigated to 100l.) against a malster at *Plymouth*, for having on the 27th of April 1807, wetted corn, then and there making into malt, in a certain stage of operation, while the corn was a-floor, after it had been emptied out of the cistern used for steeping it, *before the full end and expiration of 12 days* from the time when the corn had been so emptied out of the cistern; contrary to the form of the statute, &c. Nothing turned on the par-

(1) Vide *Ritchie v. Atkinson*, ante 295.

ticular form of the conviction; but it appeared from the evidence set out that the offence must have been committed between the 20th and the 27th of *April* 1807. And the only question was, Whether at that period the act of the 42 Geo. 3. c. 38. s. 30, was in force? As to which the case stood thus:

By that statute no malster shall wet any corn making into malt in any stage of operation after the same has been emptied out of the cistern used for steeping such corn until the expiration of 12 days, on pain of forfeiting 200*l*. By st. 46 Geo. 3. c. 139. s. 1., after reciting the expediency of repealing some of the provisions of the 42 Geo. 3., it is enacted, that from and after the 1st of *August* 1806, so much of the recited act as describes the offence above-mentioned in the terms of it shall be *repealed*, except in cases where any fine shall have been then incurred. And by s. 3., from and after the 1st of *August* 1806, no malster shall wet any corn making into malt, in any stage of operation, after the same shall have been emptied out of the cistern, &c. until the expiration of 216 hours (or 9 days), on pain of forfeiting 200*l*. By s. 12 and 13, the general remedies for recovering penalties, &c. given by former acts are reserved. And s. 14, enacts "That this act shall commence and take effect as to all such matters and things therein contained, in respect whereof no special commencement is hereby directed and provided, from and immediately after the 1st of *August* 1806, and shall remain and continue in force until the 25th of *March* 1807." The last mentioned act was suffered to expire on the said 25th of *March* 1807, and was *revived* by the stat. 47 Geo. 3. st. 2. c. 37, from the passing of the act on the 8th of *August* 1807, and continued until the 25th of *March* 1809; when, having again expired, it was on the 14th of *April* 1808, by the act of the 48 Geo. 3. c. 36, further *continued* till the 24th of *June* 1809. And it was in the interval between the 25th of *March* 1807, when the temporary repealing act of the 46 Geo. 3. c. 139, expired, and the 8th of *August* 1807, when it was revived, *viz.* on the 27th of *April* 1807, that the offence in question against the repealed provision of the st. 42 Geo. 3, was committed. And the information on which the defendant was convicted was exhibited on the 16th of *July* 1807, and the conviction itself took place on the 11th of *January* 1808, after the 46th of the king had been revived.

Harris moved to quash the conviction, which had been returned into this court by *certiorari*, on the ground that the stat. 46 Geo. 3, having repealed the provision of the stat. 42 Geo. 3, which constituted the offence of which the defendant had been convicted, and having substituted another provision in its place: though this latter were only temporary; the prior provision did not revive upon the expiration of the temporary one: for which he cited *Warren v. Windle*, 3 East, 206. And if not, it was admitted that it would not be *revived* during this period by a subsequent *continuing* law, which had passed upon the supposition that the first was then an existing law. The rule was laid down in *Warren v. Windle*, that the prior law would not revive after the repealing temporary statute was spent, unless the intention of the legislature to that effect were expressed; which, he said, did not appear in this case. [He was not, however, at first aware of the 14th section of the 46 Geo. 3, which is not in the common printed edition of the statutes. But he afterwards argued] That the operation of the 14th clause was merely confined to the substituted provision in the 3d clause; and that if the first clause did not operate as a perpetual repeal it would be nugatory; for the third clause, being affirmative, 6 Bac. Abr. 372, statute D., was, while it was in force, a temporary virtual repeal of the former statute. And the argument *e contra* must assume that the suspension and the repeal of an act are the same thing.

Dampier, contra, relied upon the 14th sect of the temporary repealing statute of the 46 Geo. 3., as evincing the intention of the legislature not to repeal the 42d of the king absolutely, but only from the 1st of *August* 1806 to the 25th of *March* 1807; which, he said, made an end of the question. He said,

that he did not differ from the principle laid down by the defendant's counsel, but only on the application of it to this case. The object of the temporary repeal was to give time for making the experiment as to the alteration of the period in respect of wetting the malt; and could not have been meant to abolish every check upon fraud against this branch of the revenue. It was a clear rule, that by the repeal of a repealing statute the original statute is revived: 6 Bac. Abr. 372, Statute D.: and it must be the same thing if the repealing law itself provide that the repeal shall be only temporary. And he cited the case stated in Sir T. Ray. 397, as strongly to the purpose. In 1661, the assembly of *Jamaica* made a law for raising a revenue by a tax on strong liquors, which was indefinite and perpetual: afterwards they passed another law granting the like revenue, but to continue for two years. The question was, whether this latter was a virtual repeal of the former law? And it was held by Lord C. J. *North* and several of the Judges assembled, upon debate, that it did not repeal the perpetual law, but only suspended its power, during those two years; and when those two years expired, it was as if no such act had been made.

Harris, in reply, relied on the subsequent acts reviving and continuing the st. 46 G. 3, to shew that the legislature did not mean to permit the original statute to revive after the 25th of *March* 1807: but it was evident that the act of the 46 G. 3, was twice suffered to expire for a short period by an oversight. And he argued that the inference of such intent was allowable to be drawn from those subsequent statutes, which had passed before the conviction in question. That the case in Sir T. Ray. was very distinguishable from the present; for there the second law was merely nugatory; as making the same provision, though for a less time than the former one, which it did not affect to repeal; but here the second statute declared the repeal of the first in general terms, and substituted something else in the place of it, which at first was meant to be only temporary.

Lord ELLENBOROUGH, C. J. It is a question of construction on every act professing to repeal or interfere with the provision of a former law, whether it operate as a total or a partial and temporary repeal. Here the question is, whether the provision of the stat. 42 Geo. 3., which was originally perpetual, be entirely repealed by the 46th of the king, or only repealed for a limited time: if the latter, then the conviction, being after the expiration of the repealing law, which was only to continue in force till the 25th of *March* 1807, was proper. The last recites, indeed, that certain provisions of the former one should be *repealed*; but this word is not to be taken in an absolute, if it appear upon the whole act to be used in a limited sense. And it does so appear by the 14th section, which specifies that the act shall commence on the 1st of *August* 1806, and shall continue in force until the 25th of *March* 1807. Then bringing forward that clause and incorporating it with the first, it is the same as if the act of the 46 Geo. 3. had said in terms, that the provision in the 42d of the king should be repealed from the 1st of *August* 1806 until the 25th of *March* 1807; which in effect is to suspend its operation only for a limited time. So understanding the legislature to speak upon this occasion, it is unnecessary to consider the interpretation which has been put on other repealing or suspending laws, under different circumstances: but the case of the *Jamaica* laws is no authority to impeach this interpretation; as the second act of assembly imposing a certain duty for two years which had before been imposed permanently, seems to have been purely nugatory. Then with respect to the subsequent acts which passed after the 46 Geo. 3., and which have been relied on, I cannot infer from them what the intention of the legislature was in the 46 Geo. 3., unless they had spoken such intent clearly; which they have not done.

GROSE, J. The question turns on the true construction of the 46 Geo. 3, as to the intent of the legislature to repeal wholly, or only for a limited time,

the provision in the 42 Geo. 3. The 46 Geo. 3. was evidently a mere probatory act suspending the provision of another act for a limited time, in order to see what effect the new regulation would have in suppressing frauds against the malt revenue. For this purpose, though it uses at first general words of repeal, it specifies precisely the times when the new act shall commence its operation, and how long it shall continue in force. This therefore is a very plain and clear declaration of the intention of the legislature, that it did not mean wholly to repeal, but only to suspend the operation of the former law for the time limited: and the words of the subsequent acts must speak a contrary intent as plainly and clearly before we could give it effect.

LE BLANC, J. The question arises wholly on the construction of the 46 Geo. 3., whether it is to operate as a total repeal of the 42 Geo. 3., so as that the former provision could not be brought into force again but by a distinct re-enactment; or only for the time limited in the 14th section. Now, taking the different clauses of the 46th Geo. 3. together, it appears to have been merely an experimental act superseding the former provision during the time limited by the 14th section: and if that were the meaning of the legislature to be collected from the whole act, there is an end of the argument. Then as to the subsequent acts, we must consider it the same as if the question had come to be decided between the 25th of *March* 1807 and the 8th of *August* in that year, when the first subsequent act was passed, within which period the information was laid before the magistrate, on which he was to decide, and on which the conviction was afterwards founded. The magistrate could only have collected the intention of the legislature from the two acts of the 42 and 46 Geo. 3.

BAYLEY, J. The true construction of the stat. 46 Geo. 3. taken altogether, is, that the first clause shall operate only as a suspending clause upon the 42d of the king; for the 14th clause says that "*this act* shall commence and take effect" only from the 1st of *August* 1806 until the 25th of *March* 1807. Then if *this act* mean the whole of the act, there is an end of the question. And I consider it as relating to the whole act; and after the time limited by the act for it to take effect, I consider the question the same, as if that act were no longer to be found in the statute book.

Conviction affirmed.

'The King v. The Inhabitants of Standon Massey(a).

10 East, 576. Feb. 11, 1809.

A statute fair being held yearly on the day after old *Michaelmas*, except when old *Michaelmas* falls on a *Saturday*; and then the fair being held on the *Monday*; held that a hiring from such *Monday* till old *Michaelmas* day following is not a yearly hiring under which a settlement can be obtained.

ALICE KNIGHT was removed by an order of justices from *High Ongar* to *Standon Massey*, in *Essex*. The Sessions, on appeal confirmed the order, subject to the opinion of this Court on the following case.

Ongar statute fair is held yearly on the day after old *Michaelmas*, except when old *Michaelmas* day falls upon a *Saturday*, and then on the following *Monday*. At Ongar fair 1806, held on a *Monday*, which was two days after old *Michaelmas* day in that year, the pauper was hired to serve *W. C.* of *Standon Massey* from the fair day till the old *Michaelmas* day following, at the yearly wages of 4*l.* 10*s.* She entered on her service upon the *Thursday*,

(a) I was not present when this case was decided, but was favoured with this report of it from Mr. *Boesauquet*.

and continued therein till the evening of the following old *Michaelmas* day, when she received her full wages. The Sessions found, that the service from the time of the hiring to the *Thursday* was dispensed with by the master.

Bosanquet and *Walford*, in support of the order of Sessions, contended that although the pauper was in fact only hired for 364 days, this was a good hiring for a year within the statute. They relied on *The King v. Newsted*, Burr. S. C. 669, in which a hiring from *Whitsunday* to *Whitsunday* was held sufficient, although the period did not comprehend 365 days: and argued that if a hiring from a moveable feast in one year to the same moveable feast in the next year were good, a hiring from an annual fair to fair, as in this case, was equally good. The period in the latter case could never be less than 364 days; but from *Whitsunday* to *Whitsunday* might be less than a year by several weeks.

Pooley and *Knoz*, contra, were stopped by the court.

Lord ELLENBOROUGH, C. J. There is a clear distinction between this case and that relied upon. There the hiring was from a moveable feast to the same moveable feast in the following year: here it is from two days after old *Michaelmas* day to the old *Michaelmas* day following. The argument that this is a good hiring, because it is a hiring from fair day to fair day, is unsupported by the facts found by the Sessions; the hiring was neither from old *Michaelmas* day to old *Michaelmas* day, nor from fair day to fair day. The cases upon this subject have gone far enough; and it is necessary to look back to the statute, which requires a hiring for a year. If we allow these constructive hirings to go on, we shall soon have it contended that a servant acquires a settlement who is hired by the keeper of a boarding-school from the breaking up at *Christmas* to the breaking up at *Christmas*, although less than a year should in fact be comprised in the period.

The other Judges concurring,

Order of Sessions quashed.

Winter v. Miles, Knt. and Another, late Sheriff of Middlesex.

10 East, 578. Feb. 13, 1809.

Kensington palace being kept in a constant state of preparation to receive the king, with his officers, servants and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of certain apartments therein.

THIS was an action against the sheriff for a false return of *nulla bona* to a writ of *feri facias* issued at the plaintiff's suit against the goods of his Royal Highness the Duke of *Sussex*, residing at the time in *Kensington* palace: and the only question was, whether *Kensington* palace were under the circumstances entitled to the privilege and protection of a royal palace, so as to justify the sheriff in refusing to execute civil process there? The particular circumstances given in evidence were afterwards stated by Lord *Ellenborough*, C. J. in giving the judgment of the Court; and the whole case was left by him to the jury at the trial to say, whether *Kensington* were *bona fide* a royal palace; and they found in the affirmative. Upon which the Court was moved in last *Trinity* term, to set aside the verdict, and grant a new trial, on the ground of its being a verdict against law and evidence. And a rule *nisi* having been granted for the more solemn consideration of the matter: cause was shown in last *Michaelmas* term, by *The Attorney-General*, *Garrow*, and *Comyn*; and the rule was supported by *Williams*,

Serjt. *Marryat*, and *Barnewall*. The principal authority referred to was *Elderton's* case, reported in 2 Ld. Raym. 978. and also in 3 Salk. 91. 284. and 6 Mod. 73. and Holt, 590. And there were also cited 2 Inst. 648. 3 Inst. 140—1. 4 Inst 133. Stat. 4 H. 7. c. 3. 33 H. 8. c. 12. 1 Hawk. P. C. ch. 21. and *Rex v. Stubbs*, 3 Term Rep. 735. The Court after the argument directed the case to stand over for consideration : and now

Lord ELLENBOROUGH, C. J. delivered judgment.

This was an action against the late sheriff of *Middlesex* for a false return of *nulla bona* to a writ of *fiery facias*, delivered to him by the plaintiff for execution against the goods of his Royal Highness the Duke of *Sussex*. The defence made by the sheriff was, that the Duke of *Sussex* had no goods in his bailiwick, except certain articles belonging to his R. H. within *Kensington* palace, where the execution could not, as the sheriff contended, be lawfully executed. And the question was, Whether *Kensington* palace, as it is called, was, under all the circumstances of its present occupation, entitled to the exemptions and privileges which are allowed to belong to a place in which the king resides? It will be recollected, that his late majesty King *George* the Second constantly resided there, as several of his predecessors had done before : that he died there : that his present majesty, upon his accession, held his first council, and performed his first acts of state and government; as king, there. It clearly, therefore, at that period was a royal palace of his present majesty, entitled to every exemption which can be claimed in respect of any palace belonging to his majesty. Being then such palace, the question is, When did it cease to be so, and become entitled to its former privileges? *Elderton's* case, in 2 Ld. Raym. 981. is the only reported case to be found, which bears any resemblance to the present. The questions which occur in this case were in some degree handled and discussed, but not decided in that case. Three Justices, *Powell*, *Powys*, and *Gould*, are there stated to have agreed, "that the privilege of the palace (*Whitehall*) remained, though the queen (the case occurred in the 2d of Queen *Anne*) were not resident." Holt, C. J., in Lord *Raymond's* report of the case, says "If the Court be kept there, though the queen's person be not present, it is a residence : but when the queen, and the whole court, and all the officers, are removed has it then the privilege of a palace?" And in another report of the same case, in 3 Salk. 284., Lord Holt is stated to have held, that where there was a total absence, as in the principal case, "where the queen was neither present in person, nor by her domestics, or any of her family, the place was not privileged." And indeed if his majesty were, in the case now before us, neither actually nor virtually present at *Kensington* ; neither in his royal person, nor by his officers, domestics, or any of his family, according to Lord Holt's language, it would be difficult to say, that such a place was entitled to the privileges of a royal palace ; and much more so, if the palace were so occupied by others as that his majesty could not immediately return and reside there in his own person, if he were pleased to do so. But it appears by the evidence of Mrs. *Steele*, who lived at *Kensington* palace as a servant to the Duke of *Sussex*, that "there were state apartments there, and a throne, &c. : that those apartments were used by nobody else; that they were reserved for his majesty, and some for his officers; that the apartments occupied by the Duke of *Sussex* were the apartments of the lord chamberlain ; and that his royal highness, (who as a member of his majesty's family came directly within the terms of Lord Holt's proposition, in the report in *Salkeld*) used the furniture which was furnished for the lord chamberlain : that there are servants, housekeeper, &c. of his majesty regularly there; and a guard in front of the palace ; that the palace was kept up fit for his majesty's reception, if he should choose to visit it; that there was a deputy housekeeper, Mrs. *Fisher*, under Mrs. *Strode*, the principal housekeeper ; that divine service was performed in the

"chapel there every *Sunday*." Another witness proved his having seen his majesty's servants giving directions there. It was not questioned but that the gardeners employed there were paid by his majesty, and that the produce of the gardens were applied to his majesty's use. It was indeed proved, that some families resided in parts of the palace; but from the evidence before stated, the palace was, notwithstanding this, "kept fit for his majesty's reception at any time when he should choose to come there." Under these circumstances it cannot fairly be said, that his majesty was not there present, within the terms used by Lord *Holt*, by his "*domestics, or any of his family*:" nor that the palace was so occupied as to preclude the possibility of his majesty's immediate personal return there at any time. The question of the discontinuance of any place as a palace of residence, which had at any time been so used, by the sovereign upon the throne, might involve in its discussion many extremely delicate circumstances. It would not be a very seemly matter of inquiry, whether his majesty had by any and by what manifestations of his royal will indicated a purpose of not returning to any particular palace. So long, however, as the emblems and ensigns of his kingly dignity are preserved in such palace, and the apartments exclusively appropriated to his use, are by his immediate servants kept ready and in a fit condition to receive him at any time; whilst others are kept in like manner for the use of his officers; and some are immediately occupied by his majesty's sons; and no such use made of the rest of the palace as to preclude or materially interrupt his majesty's return to it whenever he might choose so to do: his majesty, we think, may be considered as virtually residing there, within the more restrained language of Lord *Holt*, as well as within the larger doctrine of the three other Judges who sat with him, when the only other case in any degree resembling the present came under judicial consideration. On these grounds we think the finding of the jury was warranted under the facts of this case: and that a palace thus in all respects circumstanced, may be considered as a place exempt and privileged from the execution and service of the ordinary process of the law, and the defendant of course excused in not having levied, within its precincts, the execution in question. Had it indeed distinctly appeared in evidence, that the immediate personal residence of his majesty was, by means of any occupation of the palace incompatible therewith, rendered impracticable, we might have formed a very different conclusion on the subject before us. And whenever a case so circumstanced shall occur, the Court will not feel itself bound by any thing now laid down from directing a jury, that the exemption in question ought in such a case to be disallowed.

Rule discharged.

Doe, on the Demise of Sir William Milner, Bart. v. Brightwen.

10 East, 583. Feb. 18, 1809.

A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of *England* according to the custom of the manor; though the only evidence of such custom on the Rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance by the general law of copyhold, and the title of a tenant by the curtesy being also by operation of law.

And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him *pursuant to the settlement*, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death.

And though 1-3d of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seized and admitted; and the steward of the manor, appointed by the heir at law and her husband, had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime,) for above 20 years back, debited himself with the receipt of 2-3ds of the rent for the husband on account of his wife, and the remaining 1-3d for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-3ds as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death.

Nor will any release from the heir at law living at the time of such curtesy estate be presumed during that period; nor after his death from the present heir at law, who might be called upon in equity to discover it, if given; though such release, if proved or presumed, would bar the copyholder's claim.

THIS ejectment was brought by the lessor of the plaintiff, claiming as heir at law, to try the title to copyhold lands called *Netherlands*, in the manor of *Totesbury* in *Essex*, formerly part of the estate of Sir *Thomas Darcy*, who left three daughters, his co-heiresses, *Frances*, *Maria*, and *Elizabeth*. *Frances*, in 1692, married Sir *William Dawes*, afterwards Archbishop of *York*, and died in 1705. The archbishop died in 1724. *Maria* married *Thomas Butler*, whom she survived, and sold her share of the premises in question to her sister *Elizabeth* before 1723. *Elizabeth* married *William Pierrepont*, survived her husband, and died, without issue, in 1758. *Francis* had issue by the archbishop *Elizabeth Dawes*, and Sir *Darcy Dawes*. *Elizabeth Dawes* (through whom the lessor of the plaintiff claimed) married Sir *William Milner* (the grandfather of the lessor) in 1716, and died in March 1782. They had issue a son *William* who died in 1774, leaving the lessor of the plaintiff his eldest son and heir. Sir *Darcy Dawes* married *Sarah Roundell* in 1723, and died in 1732. *Sarah* Lady *Dawes* died in 1773. They left a daughter *Elizabeth*, who, in 1746, married *Edwin Lascelles*, the late Lord *Harewood*. She died in 1764, and her husband Lord *Harewood* in 1795; having had issue by her husband a daughter who died shortly after her birth. The defendant was the tenant in possession under the present Lord *Harewood*, brother of the late Lord from whom he claimed the premises in question by devise, he having surrendered to the use of his will.

It appeared from the court rolls, that *Darcy Dawes*, (son and heir of *Frances* Lady *Dawes*, then late the wife of the Rev. Sir *William Dawes*), *Maria Butler*, widow, and *Elizabeth Pierrepont*, widow, who were the daughters and

made tight, staunch, &c. and well and sufficiently equipped for a voyage or voyages of 12 calendar months; *per quod* she was hindered from proceeding on a certain voyage from London to *St. Domingo*, and detained an unreasonable length of time; during all which time the defendants were deprived of the use of the ship, and were put to great expence in making her tight, staunch, &c. and fitting her for her voyage, and divers goods of the defendants which were put on board her, were wetted and damaged. To this plea, which is pleaded to the whole of the demand, the plaintiff has demurred, and the question upon it is, Whether the defendants are entitled to insist that the *forthwith* making the ship tight, staunch, &c. was a condition precedent. The defendants did not repudiate the ship, because she was not immediately made tight, staunch, &c., but took her into their service and employed her; and after having navigated her for several months, they say that, because this was a condition precedent, and was not performed, they are not liable to pay any thing. They do not pretend that the non-performance has damnified them to the extent of the payment they wish to evade: and to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, &c., would be a breach of the condition, and a defence to the whole of the plaintiff's demand. We are clear, however, that the defendants, who took the ship into their service, and employed her in an unimpaired state, have no right to insist that the *forthwith making her tight, &c.* was a condition precedent. Whether a particular covenant is to constitute a condition precedent depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained, as is laid down in *Porter v. Shepherd*, 6 Term Rep. 668, and in *Glazebrook v. Woodrow*, 8 Term Rep. 370, 371. And it would be an outrage to common sense to say, that it could have been the intention of these parties, that if the defendants took to this ship, as a ship in their employ under the charter-party, they should be at liberty afterwards to insist that the making her complete in every particular, and that forthwith, without any delay, was a strict condition precedent on the part of the plaintiff. The cases cited are also decisive upon the point, *Constable v. Cloberie*, Palm. 397, shews that a covenant to sail with the first wind is not a condition precedent. *Bornman v. Tooke*, 1 Campb. 377, proceeds upon the same principle. *Boone v. Eyre*, 1 H. Blac. 273, in the notes, lays down a very sensible general rule, that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other: but where they go only to a part, and a breach may be paid for in damages; there the defendant has a remedy on the covenant, and shall not plead it as a condition precedent(1). Had the plaintiff's neglect here precluded the defendants from making *any* use of the vessel, it would have gone to the *whole* consideration, and might have been insisted upon as an entire bar; because the consideration for the defendants' covenant to pay the freight would then have failed *in toto*; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a *part* only: the consideration has not *wholly* failed; and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right, under a counter action, to such damages as they can prove they have sustained from this neglect. For these reasons, we are of opinion that this plea cannot be supported, and that the demurrer to it must be allowed.

The next plea submitted to the consideration of the Court is pleaded to the first breach only. It states that during the 12 months mentioned in the charter-party divers goods were shipped on board the vessel, to be carried from London to *St. Domingo*; that at the time of shipping them 'the vessel was

(1) Vide *Davidson v. Gynne*, 12 East. 381, 389. *Bennet v. Executors of Pixley*, 7 Johns. 249.

then arose whether, though there had been no surrender to the settlements, the possession of *Edwin Lascelles*, (the late Lord grounded upon his admission in 1766, were not, at any rate, an session to the plaintiff's claim as to the two thirds, from that period, e other third, from the death of *Sarah Lady Dawes* in 1773. To h it was alleged, on the part of the plaintiff, that the late Lord *Hare* n him a curtesy estate by the custom, from the death of his wife in s own death in 1795, which would have been a good defence to any brought by the lessor of the plaintiff as heir at law, or those under claimed. In answer to which, it was insisted, on the part of the r, that in order to constitute a right to an estate by curtesy, it was in necessary for the wife to have been admitted (a) to the copyhold in ime, (which she was not in this instance,) and that such was the of this particular manor: as to which the evidence stood thus. The of the manor proved, that tenancy by the curtesy of *England* prevail- ustom in this manor; but that in all the instances he had found on the olls, from whence he derived his knowledge, the wife had been pre- admitted; though there was no known distinction of that sort; nor know of a husband's enjoying without being himself admitted after his death. And he produced three instances from the rolls. The first was of *Samuel Payne*, who was admitted in *October 1766*, on the death of ife who had herself been admitted in *December 1751*. The second was an entry of the 7th of *October 1766*, which recites, that *Sarah* the wife *Samuel Clay* had been admitted to her and her heirs; and that she and husband had surrendered to the use of her will: and at this Court it was ented that *Sarah* had died seized of the premises, and *Samuel Clay*, in- ned the Court that his wife had made no will, and prayed to be admitted he curtesy of *England*, and according to the custom. The third was an ry of the 4th of *September 1798*, by which it appeared that *Susannah rovey*, having been admitted, had died, and that her husband was admitted ant by the curtesy and by the custom. The steward also said, that it did t appear from the rolls whether or not it were essential to the claim of a nant by the curtesy that there should have been issue born. Upon this part of the case the *Ld. Chief Baron* considered that the previous admission of he wife was not necessary; the admission of the husband being, as he conceived, analogous to an admission upon a descent. In neither case does any hing move from the lord, or any surrenderor; and the curtesy estate was permitted to obtain by reason of the inheritable capacity of the child when born, and was continued in the person of the husband during his life; and the want of admission of the mother would have been no objection to the claim of the child to inherit, if it had lived. And as to the steward's not knowing of any distinction of the sort contended for; the learned Judge considered the evidence to be no more than this, that he knew of no reputation in the manor to that effect: and the fact of admission of the wives in the three instances produced, which were the foundation of the steward's knowledge on the subject, he thought of little weight; as in the greater number of instances it would happen that women entitled to copyholds would be admitted, as they ought and were compellable to be: and there was no evidence of any husband's claim having been rejected on the ground of the non-admission of his wife. And the mere fact of the three husbands, in the instances adduced, having been admitted after the death of their wives, appeared to the learned Judge not to have sufficiently established that qualifying restriction part of the custom.

Another objection was, that the seisin of *Mrs. Lascelles* was not proved, inasmuch as the earliest receipt of rent proved was in 17

(a) See *Ever v. Aston, Moor*, 271, and 1 *And.* 192.

riod subsequent to her death in 1764. But the Ld. Chief Baron thought that, as the legal interest in this estate descended upon Mrs. *Lascelles* upon the death of her father Sir *Darcy Dawes* in 1732, as to one third, and as to the other two thirds on the death of *Elizabeth Pierrepont* in 1758, and that the steward of the estate had been long dead; and that, as there was no proof that the rents had been paid to any other person, such payment in 1770 was reasonable evidence of the receipt of prior rents by Mr. *Lascelles* in the lifetime of his wife, and was reasonable evidence also of the perception of one third part of them by *Sarah Lady Dawes*. That at law, the trusts of the settlement of *Sarah Lady Dawes* in 1723, and of that of 1746, could not be adverted to, as they created interests purely equitable, and no surrenders had been made to the uses of either of them: and therefore, the only point for consideration at law was as to the course of descent of the three undivided parts of the copyhold. With respect to the one third to which *Maria Butler* was admitted in 1712, and which was purchased of her before 1723, by *Elizabeth Pierrepont* her sister; and with respect to the one third to which *Elizabeth Pierrepont* herself was admitted at the same time; it seemed clear, that those two portions had descended upon their nephew Sir *Darcy Dawes*, and from him upon his daughter Mrs. *Lascelles*; and her husband Mr. *Lascelles* having had issue inheritable by her, the learned Judge thought would have entitled him to admission as tenant by the curtesy, if the objections made on the part of the defendant were not well founded; and that upon the expiration of the husband's curtesy estate by his death in 1795 without issue, the legal estate descended upon Sir *William Milner* as heir of *Elizabeth Lascelles*.

But it was urged, that the defendant was, at all events, entitled to a verdict for the remaining third, to which *Frances Lady Dawes*, the common ancestor of all these parties, was admitted in 1712, and in which *Sarah Lady Dawes*, the wife of Sir *Darcy*, had an equitable interest for life under her marriage settlement, which terminated with her life in 1773; and of which Mr. *Lascelles* had an adverse possession commencing upon his admission to the entirety in 1766. But the Ld. Chief Baron was of opinion, that as no surrender had been made to the uses of that settlement, he could not at law take notice of the equitable agreement which the parties had thought fit to execute by handing over to *Sarah Lady Dawes* the rents and profits of this one third during her life. That upon the death of Sir *Darcy Dawes* in 1732, to whom the legal interest of this third had descended from his mother, it also descended on his only child Mrs. *Lascelles*, and that her husband had also become entitled to a curtesy estate in this third, as well as in the two other thirds.

It was then contended for the defendant, that a release from those under whom Sir *Wm. Milner* claimed ought to be presumed after so long a time. But the Ld. Chief Baron was of opinion that although Mr. *Lascelles* had in fact been admitted by the lord upon a title purely equitable, and if that had been his *only* title, his possession must have been considered as adverse; as an equitable title was, to that purpose, no title whatever; yet as it appeared to him, that the legal title in all the three portions had centered in *Elizabeth Lascelles Lady Harewood*, a curtesy estate accrued to her husband in the whole; and that no presumption could take place of his possessing the estate by virtue of a release grounded on some other title. And if, on the other hand, he were to be considered as having been in possession adversely for above 20 years, he did not require the aid of any such presumption for his defence.

Upon the whole, the learned Judge was of opinion, that, dismissing the consideration of all equitable interests not grounded on any surrender, so as to clothe the trustees with the legal estate, the legal inheritance of the three undivided parts to which Sir *Darcy Dawes* (in right of his mother *Frances Maria Butler* and *Elizabeth Pierrepont* were admitted in 1712, centered first in *Elizabeth Lascelles*, (Lady *Harewood*;) that her husband became tenant

by the curtesy according to the custom of the manor ; and that by his death in 1795, the same became vested in the present lessor of the plaintiff as heir at law of Lady *Harewood*. And he was also of opinion, that possession on the part of her husband for more than 20 years, in order to bar the lessor of the plaintiff, ought to have been an adverse possession only ; but that if there were in him a good legal title, which would have furnished a clear defence to any ejectment brought against him during his life, no laches could be imputed to the party in whom the fee rested, for not having proceeded before the expiration of 20 years, or at any time before the death of the tenant by the curtesy. And on this direction a verdict passed for the plaintiff.

A new trial was moved for in last *Michaelmas* term, in order to take the opinion of the Court upon these several points, against which *Shepherd*, Serjt. *Garrow*, *Lawes*, and *Pitcairn*, shewed cause in this term ; and *The Attorney-General*, *Marryat*, and *Gurney* were heard in support of the rule, in the absence of Lord *Ellenborough* who was indisposed. The Court took time to consider of their judgment, which was now delivered by

GROSS, J. This was an ejectment for certain copyhold premises in *Essex*, which was tried before the Lord Chief Baron at the last assizes at *Chelmsford*, in which a verdict was found generally for the plaintiff. A rule was obtained in *Michaelmas* term last, on behalf of the defendant, to shew cause why there should not be a new trial. The matter came on to be argued on the second day of this term, in the absence of my Lord Chief Justice. By the report it appeared, that the lessor of the plaintiff claimed as heir at law of Mrs. *Lascelles*, who was heir at law of Sir *Darcy Dawes*, *Maria Butler*, and *Elizabeth Pierrepont*, who had been admitted to these premises in 1712, to hold to them and their heirs, and which premises, on their deaths, descended to Mrs. *Lascelles* as their heir at law. But no admission to the premises in question appeared on the court rolls from the time of the admission of Sir *Darcy Dawes*, *Maria Butler* and *Elizabeth Pierrepont*, in 1712, down to the year 1766, when Mr. *Lascelles* was admitted to the premises, to hold to him and his heirs ; and afterwards, in 1807 or 1808, the lessor of the plaintiff was admitted to the same premises. Mrs. *Lascelles* died in 1764, leaving her husband *Edwin Lascelles*, afterwards Lord *Harewood*, her surviving, and having had issue by him a daughter, who had died within a year after her birth. Lord *Harewood* lived till 1795.

On the part of the defendant, who claimed under the present Lord *Harewood*, it was contended, 1st, that there had been an adverse possession from the death of Mrs. *Lascelles* in 1764, upwards of 40 years. To this it was answered, that by the custom of the manor the husband was entitled to hold the copy hold tenements of his wife, after her death, for his life, in the nature of tenant by the curtesy ; and that Lord *Harewood* having survived his wife, and lived till 1795, there was no possession adverse to the title of the lessor of the plaintiff, till after that time ; inasmuch as the heir at law of Mrs. *Lascelles* could not recover the possession of the premises while her husband's estate by the curtesy existed. And to prove the custom of the manor as to the right of the husband, in the nature of tenant by the curtesy, three entries were read from the court rolls ; the first, an admission of *Samuel Payne* in October 1766, on the death of his wife, who had been herself admitted in December 1751. The second, of the 7th of October 1766, which recited that *Sarah*, the wife of *Samuel Clay*, had been admitted to her and her heirs, and that she and her husband had surrendered to the use of her will ; and it was presented that *Sarah* had died seized of the premises ; and *Samuel Clay* informed the Court, that his wife had made no will, and prayed to be admitted by the curtesy of *England* and according to the custom. The third, of the 4th of September 1798, by which it appeared that *Susannah Harvey*, having been admitted, had died ; and that her husband was admitted tenant by the curtesy and by the custom. To this evidence of the custom, it was objected on the part of the

defendant, that it appeared from the three entries above stated, that the wife had been previously admitted; and as there was no evidence of the custom but these entries on the rolls, there did not appear any custom for the husband to enjoy as tenant by the curtesy, except where the wife had been in her lifetime admitted: which was not the case here, as Mrs. *Lascelles* had never been admitted, and therefore her husband could not bring himself within the custom. But we think on this point, that the admission of the wife is not a necessary ingredient by the custom to entitle the husband to hold for his life, in cases where the title of the wife is complete without admission by the general law of copyholds; as is the case where her title is as heir; in which case any person may derive title through her by operation of law, without admittance; and the title of the husband is by operation of law(1). In the present case, Mrs. *Lascelles*'s title was as heir to the three coparceners: her title was complete, without admission, to all purposes, except as against the lord, with respect to his right to his fine: and therefore we think that the entries given in evidence were sufficient to support the custom of tenancy by the curtesy, without the qualification of admittance of the wife, inasmuch as her title was such as not to require admittance to perfect it.

The plaintiff then proved in evidence the accounts of a former steward of this estate in 1770 now deceased, in which he charges himself thus: "*Golden Griggs* (the steward) Dr. to *Edwin Lascelles*, Esq. and *Lady Dawes*, for rents "received of *C. Richardson* (the tenant) a year's rent 42*l.* to *Michaelmas* 1769. "Two thirds, *Edwin Lascelles* Esq.—one third, *Lady Dawes*." This *Lady Dawes* was the mother of Mrs. *Lascelles*: to which *Lady Dawes* a life estate had been limited on her marriage in one third part of the premises in question; but, for want of a surrender, the limitations of that settlement, as to the copyhold part, were not valid at law. And on this evidence it was contended for the defendant, that although it afforded fair ground for the jury to find Mrs. *Lascelles* in her lifetime, and afterwards Mr. *Lascelles*, in possession of two-thirds of the premises till his death, by receipt of two-thirds of the rents and profits; yet it shewed them out of possession of the remaining one-third, of which *Lady Dawes* was in possession, which possession was adverse to the lessor of the plaintiff. And that at all events, therefore, the defendant is entitled to a verdict in his favour as to this one-third. But on this point we think that no distinction can be made between the two thirds and the one third; for the payment of the one third of the rents, being made to *Lady Dawes*, under her equitable title by the steward of the whole estate, must be considered as a payment made to her by the order and with the consent of the person entitled at law to the whole, in consideration of the equitable claim, that is, by Mrs. *Lascelles* in her life time, and Mr. *Lascelles* after her death; and amounts to the same thing as if they had received the whole rent, and afterwards paid one third to another person to whom they had by an instrument not valid in law agreed to pay it.

The third objection made by the defendant to the plaintiff's title to recover, is, that here was ground to presume a release from Sir *Wm. Milner*, or some person under whom he claimed: and it was correctly stated at the bar, that although copyhold premises can only pass by surrender, and not by release, yet that a release given by a person claiming title to a person in actual possession will extinguish such releasor's title or claim: and that in this case,

(1) In *Connecticut* it has been held, that the husband may be tenant by the curtesy of lands to which the wife had title, but of which she was not actually seised during coverture. *Bush v. Bradley*, 4 Day. 298.*

* [So, in *Pennsylvania*, actual seisin by the husband during coverture is not necessary, to entitle him to the curtesy estate; if there be a potential seisin or right of seisin. 8 S. & R. 75, per *Duncan, J.* It seems to be otherwise in *N. York*. *Jackson v. Johnson*, 5 Cow. 74. 98. *Same v. Sellick*, 8 Johns. 262. *Adair v. Lott*, 8 Hill. 182. See also *Davis v. Mason*, 1 Pet. 503.—*W.*]

Mr. *Lascelles* having been actually admitted tenant on the court rolls in 1766, and in possession of the estate, was capable of taking a release from the lessor of the plaintiff, Sir *Wm. Milner*, or from his grandfather, who survived his father and died in 1782. On this point, however, we do not see sufficient ground for presuming such release: for Sir *Wm. Milner*, the grandfather, died during the continuance of the estate by curtesy of the late Lord *Harewood*, during which time the grandfather, Sir *Wm. Milner*, could not have set up any claim to the possession of this estate: and from the death of the late Lord *Harewood* to the present time, the title has been in the present lessor of the plaintiff, from whom a release shall not be presumed, especially when he might, by proceedings in equity, be called on to discover whether such release were ever executed by him. We therefore think that the verdict in favour of the plaintiff for the whole is right, and that the rule for the new trial should be discharged.

AN
INDEX
TO THE
PRINCIPAL MATTERS.

[THE PAGES REFERRED TO ARE THOSE OF THE PRESENT EDITION.]

ABATEMENT.

- 1 ONE indicted for a misdemeanor may plead in abatement a misnomer of his surname, *Shakepear* for *Shakespeare*; which shall not be taken for idem sonans: and the plea, concluding with *praying judgment of the said indictment, and that he may not be compelled to answer the same, in good.* *The King v. Shakespeare*, 11 48 G. 3. 255
- 2 In abatement the Court will give no other than the proper judgment prayed for by the party; but in the case of pleas in bar, the Court will give that which appears to them to be the proper judgment upon the whole record, whether regularly prayed for or not. *ib.*
- 3 A plea of ancient demesne was permitted to be filed *de bene esse* within the four first days, pending a rule nisi for permission to allow the plea so filed. *Doe dem. Morton v. Roe*, H. 49 G. 3. 494

ACCOUNT STATED.

See ASSUMPSIT, 7.

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See PLEADING, 20.

See FRANCHISE, 1. GUARANTEE.

- 1 If a man place dangerous traps baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbour's premises, must probably be attracted by their instinct into the traps; and in consequence of such act his neighbour's dogs be so attracted, and thereby injured, an action on the case lies. *Townsend v. Wallen*, H. 48 G. 3. 142
- 2 In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods under a writ of *fieri facias*, by which they were sold much under value, where, in stating the substance of the writ, the count

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alleged that the sheriff was commanded to levy 80s. awarded to J. C. for his damages sustained by occasion of the detaining the debt; that is proved by the writ which stated that the 80s. were awarded to J. C. for his damages sustained as well by reason of detaining the debt as for his costs, &c.; for costs are in legal sense included in the word damages. *Phillips v. Bacon*, H. 48 G. 3. 152

AFFIDAVIT.

See AUTERFOITS ACQUIT.

AGREEMENT.

- 1 One having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and, after their decease, in trust for all and every the child and children of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any issue, then, after the decease of the survivor, in trust for her grandson, in fee, who was her heir at law: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the lifetime of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; held that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that each of their children as should be living at the death of the survivor of the daughters would take estates in fee, as tenants in common. *Robinson v. Grey and Others*, M. 48 G. 3. 17

- 2 Proof that the defendant agreed to sell his horse warranted sound to the plaintiff for 31l. 10s., and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14l. 14s., and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31l. 10s. the defendant promised that it was sound; and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the said 31l. 10s. *Hlands v. Burton*, E. 48 G. 2. 175

ALIEN ENEMY.

The Court would not stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies. *Vanbrynen v. Wilson*, H. 48 G. 3. 162

AMENDMENT.

Order to amend writs of fieri facias on a judgment, and declaration thereon, conformably to the judgment roll. *Braswell v. Jeco*, H. 48 G. 3. 160

ADMIRALTY.

See ASSUMPSIT, 9.

The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be seaworthy or repairable so as to carry the cargo to its place of destination, but at an expence exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to sell the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised bona fide in a case of necessity, still the vessel, subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repairs on the spot can only be conveyed by the captain in the form prescribed by the register acts: and the requisites of those acts not having been complied with, the sale in question was held to transfer no property to the vendee. *Reid v. Darby*, T. 45 G. 3. 322

ADMINISTRATOR AND EXECUTOR.

- 1 Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, are liable to costs; for the fact of their possession is immaterial; and they may sue in their own right. *Hollis v. Smith*, M. 49 G. 3. 850
- 2 A count in covenant, charging the defendants as executors of breaches of covenant by their testator as lessee, who had cove-

nanted for himself, his executors, and assigns, may be joined with another count, charging them that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one D. A. against whom breaches were alleged; and concluding that so neither the testator, nor the defendants after his death, nor D. A. since the assignment to him, had kept the said covenant, but had broken the same. And plene administraverunt may be pleaded to both counts. *Wilson v. Wigg*, M. 49 G. 3. 398

- 3 It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead plene administravit of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading plene administravit by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund out of which any devastavit by the first executor could be made good. *Wells v. Fyde*, M. 49 G. 3. 399

AFFIDAVIT to hold to bail.

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiffs so much for interest money, under and by virtue of an agreement, is not sufficient. *Brook v. Trist*, M. 49 G. 3. 419

ANCIENT DEMESNE.

See ABATEMENT, 3.

ANNUITY.

- 1 Where tenant for life conveyed estates to trustees for 99 years, if he should so long live, in trust to raise money by the grant of annuities for his life; and afterwards he and the trustees granted an annuity to one by deed, reciting the former conveyance to the trustees. It is not necessary by the annuity act 17 G. 3. c. 26, to enroll a memorial of the trust deed; it not being "a deed, instrument or assurance whereby any annuity is granted," but only a deed of conveyance to those who afterwards granted the annuity, and constituting their title to the estate charged therewith. *O'Callaghan v. Ingilby*, M. 48 G. 3. 77
- 2 Where the memorial of a bond, conditioned to secure an annuity, recited in the condition an indenture between the same parties, and part of the same assurance, which stated the annuity to be granted "for the price of 1800l., which said sum of 1800l. was paid by the grantee to the grantors by his draft on R. and Co. his bankers, at or before the sealing and delivery of the said indenture and bond;" and the memorial of the said indenture stated that the indenture witnessed that "in consideration of 1800l. to the grantors, in hand paid by the grantees, and which was paid to them by his draft on R. and Co. his bankers, &c. the payment

- and receipt of which said 1800*l.* the grantors did thereby acknowledge," the annuity was granted: this does sufficiently import, that the consideration money was actually received by the grantors, through the medium of the draft, before the execution of the deeds granting the annuity; so as to dispense with the necessity of setting out in the memorial the particulars of such draft, with the time of payment. *ib.*
- 3 The annuity act does not require that the estates charged with the annuity should be specifically set forth in the memorial: and therefore it is no objection that the memorial only stated the annuity to be charged on all the grantor's estates in the county of York, and all other his premises conveyed to certain trustees. *ib.* 77
- 4 It is no objection to the memorial of the deed granting the annuity, that it stated it in general terms, to contain "powers of distress and entry, as stated in the deed;" for the annuity act does not require such powers to be stated, except as far as they create a trust, which brings them within the branch of the act relating to trustees. *ib.*

Nor

- 5 Is the memorial required to state the covenants of the grantors for the due payment of the annuity. *ib.*
- 6 The grantor of an annuity and his sureties having given their joint and several bond, whereby they bound themselves, their heirs, executors, and administrators, to secure the annuity: a memorandum stating generally, that they became bound to the grantee, &c. though it may be good, without stating that they became jointly and severally bound, as not being inconsistent with the extent of their obligation; yet is bad, for the omission of stating the extent of the security in respect to their heirs; these not being bound as personal representatives are, without being named. *Horwood v. Underhill*, T. 48 G. 8. 313

APPEAL.

- 1 By the stat. 35 G. 3. c. 101, s. 2, the party aggrieved by an order of Justices, directing payment, to the amount of above 20*l.* of the charges and costs of the suspension of an order of removal, on account of the illness of the pauper, may appeal to the next sessions, in like manner as against an order of removal, though he want to give notice of such his appeal within three days after the demand of such charges and costs; by which he makes himself liable to a distress for the amount. And if on appeal the former order he vacated, or the amount of the charges to be paid be reduced, the surplus, if before levied by distress, must be refunded. *The King v. The Inhabitants of Bradford*, M. 48 G. 3. 61
- 2 Though an appeal against an order of removal has been entered and adjourned once by virtue of the stat. 9 G. 1. c. 7. s. 8; and though the justices in sessions have a discretionary power to determine whether

reasonable notice has been given of the appellant's intention to proceed on the trial of such adjourned appeal; yet if they dismiss the appeal at such adjourned sessions, without hearing it, on the ground that they have no authority to try it for want of a sufficient length of notice to the respondents, according to a new rule of practice promulgated two sessions before, but then first acted upon, and which was not known to the appellant's attorney, who had given the former usual notice; this Court will grant a mandamus to the sessions to enter continuances and hear the appeal. *The King v. The Justices of Wiltshire*, M. 49 G. 3. 440

APPRENTICE.

An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture. *The King v. The Inhabitants of Ripon*, H. 48 G. 3. 150

ARREST.

One who had been appointed Consul General from the *Porte*, but was dismissed several months before from his employment, and another person resident here appointed in his room, is not at any rate privileged from arrest; though at the time of the arrest he had not received any official notification of his dismissal, or of the appointment of the other. *Marshal v. Critico*, E. 48 G. 3. 219

ARREST OF JUDGMENT.

See PLEADING, 20.

ASSUMPSIT.

- 1 A customer paying bills, not due, into his bankers in the country, whose custom it was to credit their customers for the amount of such bills, if approved as cash (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy; and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received. *Giles v. Perkins and Others, Assignees of Dickenson and Others*, M. 48 G. 3. 22
- 2 One who had voluntarily offered to pay a sum of money for the use of the poor of the parish in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer was consented to by a magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor: may at any rate countermand the application of the money before it is so applied; and may recover it back in an action for money had and received. *Taylor v.*

- Landey, M.* 48 G. 3. 89
- 2 The law will not raise an assumpsit upon a judgment by default in one of the colonies against a party, who upon the face of the proceedings appeared only to have been summoned "by nailing up a copy of the declaration at the court-house door;" it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time of the suit commenced or afterwards: although by a law of the colony if a defendant be *absent from the island*, and have no attorney, manager, or overseer there, such mode of summoning him shall be deemed good service: for the *absence* thereby intended is of one who had been *present* and subject to the jurisdiction: though even if it had been meant to reach strangers to the jurisdiction, it would not have bound them. *Buchanan v. Rucker*, H. 48 G. 3. 103
- 4 Proof that the defendant agreed to sell his horse warranted sound to the plaintiff for 31l. 10s., and at the same time agreed that if the plaintiff would take the horse at that value, he the defendant, would buy another horse of the plaintiff's brother, for 14l. 14s., and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31l. 10s., the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the said 31l. 10s. *Hands v. Burton*, E. 48 G. 3. 175
- 5 Where money in litigation between two parties has by mutual consent been paid over to a trustee, in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to waive all objections to form. *Ker v. Osborne*, E. 48 G. 3. 198
- 6 A wagering contract for 50 guineas, that the plaintiff would not marry within six years, is *prima facie* in restraint of marriage, and therefore void, no circumstances appearing to shew that such restraint was prudent and proper in the particular instance. *Hartley v. Rice*, T. 48 G. 3. 268
- 7 A collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate, no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5l. inclosed in a letter to the plaintiff, in which he stated that she should have the remainder next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for tolls. *Peacock v. Harris*, T. 48 G. 3. 305
- 8 The authority of one partner to bind another, by signing bills of exchange and promissory notes in their joint names, is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. *Lord Viscount Gallway v. Mathew and Another*, M. 49 G. 3. 876
- 9 Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of the homeward bound cargo, from Honduras Bay to London; and the ship and cargo, after capture and recapture, having been wrecked at St. Kitts, into which they were carried by the recaptors, a sale of the cargo was directed by the vice admiralty court there, on the application of the master acting *bona fide* for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners. Held that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight *pro rata itineris*. For such form of action for the proceeds of an illegal sale of goods is only a waiver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods, (subject to the legal consequences of considering the demand as a debt: which admits of a set-off, &c.) but does not recognise the right of the vendor so as to convert the goods. And here the act of conversion, (for such it must be taken to be) being made by the master who is the general agent of the ship owners, (and not as in *Bellie v. Montgomerie* by the act of a court of competent jurisdiction,) was unlawful, and discharged the claim of the ship-owners for freight *pro rata itineris*. *Hunter v. Princep*, M. 49 G. 3. 428
- 10 But the plaintiff could not recover against the ship owners, upon special counts framed upon the bills of lading signed by the master, as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject matter by a contract not under seal, and signed by their master only, and not by themselves. *ibid.*
- 11 Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship to freight to the defendants on a voyage from Shields to Lisbon with convoy; the freight to be paid on right delivery of the

- cargo*; the ship having sailed from *Shields* with her cargo, and joined convoy at *Portsmouth*; and after being detained near a month off *Lymington*, her sailing orders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants, have refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant, and then was sold by consent of both parties without prejudice: held that the plaintiff could not recover freight pro rata or demurrage. *Liddard v. Lopes*, H. 49 G. 3. 495
- 7 The master and the freighter of a vessel of 400 tons having mutually agreed in writing, that the ship being fitted for the voyage, should proceed to *St. Petersburg*, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to *London* and deliver the same, on being paid freight, &c.: held that the master, after taking in at *St. P.* about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on *British* ships by the *Russian* government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted bona fide and under a reasonable and well grounded apprehension at the time; and the hostile embargo and seizure was in fact laid on six weeks afterwards. *Atkinson v. Ritchie*, H. 49 G. 3. 391

ATTACHMENT.

See INSOLVENT DEBTOR, 1.

ATTORNEY.

An attorney of *B. R.* in pleading his privilege against being sued by original, improperly stated the custom of this court to be not to compel its attorneys to answer an original writ, unless first forejudged from their office, &c. (which is the custom in *C. B.* but not in this court:) but held that enough appearing to sustain the plea, the custom which had no foundation here (of which the court would take notice) might be rejected as surplusage. *Stokes v. Mason*, E. 48 G. 3. 208

AUTERFOITS ACQUIT.

One was indicted in *Middlesex* for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a prout patet by the affidavit affiled in the court of *B. R.* at *Westminster*, &c. and on this he was acquitted: after which he was indicted again in *Middlesex* for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in *London*; which was traversed by an averment that in fact the defendant was so sworn in *Middlesex* and not in *London*: and held that he was entitled to plead auterfoits acquit; for the jurat was

not conclusive as to the place of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence. *The King v. Emden*, E. 48 G. 3. 214

AUTHORITY.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor; which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the court-house for the use of the poor; may at any rate countermand the application of the money before it is so applied, and may recover it back in an action for money had and received. *Taylor v. Lendey*, M. 48 G. 8. 39

AWARD.

- 1 An award, that certain actions be discontinued, and each party pay his own costs, is final and good; being in effect an award of a stet processus. *Blanchard v. Lilly*, E. 48 G. 3. 241
- 2 Where by the rule of reference the costs were to abide the event of an award; that includes the costs of the reference as well as of the cause. *Wood v. O'Kelly*, E. 48 G. 3. 214

BAIL.

- 1 None can be holden to special bail in detinue or trover without a judge's order. *Reg. Gen. H.* 48 G. 3. 325
- 2 Bail above having been put in and exception entered in the vacation, notice of justification for the first day of the next term must be given within 4 days after such exception. *Millson v. King*, E. 48 G. 3. 213

BAIL IN ERROR.

Bail in error is not necessary upon the stat. 3 Jac. 1. c. 8. in debt on bond conditioned for the payment of money, and also for performing covenants in a mortgage deed. *Butler v. Brushfield*, M. 49 G. 3. 441

BAIL BOND.

- 1 Where the writ was to appear before the King wheresoever he should then be in England, and the sheriff took a bail bond for the party's appearance before the King at *Westminster* on the day named in the writ; held to be a substantial compliance with the stat. 23 H. 6. c. 9. so as to entitle the assignee of the sheriff to recover on such bond. *Jones v. Sturdy*, M. 48 G. 3. 42
- 2 Where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first

day of term, being the return day of the writ, and the under-sheriff signified his assent to the surrender by return of post the next day, at the distance of 17 miles; held sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment afterwards, with notice of such surrender. *Plimpton v. Howel*. T. 48 G. 3.

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BANKER.

See *INFRA* BANKRUPT, 1.

BANK NOTES.

See *EXECUTION*, 1.

BANKRUPT.

- 1 A customer paying bills, not due, into his bankers in the country, whose custom it was to credit their customers for the amount of such bills, if approved as cash, (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy; and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received. *Giles v. Perkins and Others, Assignees of Dickenson and Others*, M. 48 G. 3. 22
- 2 Neither the bankrupt, nor any person claiming from him by assignment subsequent to the commission of bankruptcy, shall be permitted in an action at law to question the validity of such commission, and recover from the assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out. *Donovan, Assignee of Kennel an Insolvent Debtor, v. Duff, Assignee of the same Kennel, under a Commission of Bankrupt*, M. 48 G. 3. 26
- 3 The certificate of a bankrupt allowed after the filing of the plaintiff's bill and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 G. 2. c. 30. s. 7. viz. that before the exhibiting of the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt. *Harris v. James*, M. 48 G. 3. 54
- 4 *A., B., and C.*, partners and distillers, occupied certain premises leased to *A.* and another and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in *A.* On the dissolution of the partnership, which was a losing concern, it was agreed that *C.* and one *J.* should carry on the business on the premises; and by deed between the two last and

A. it was covenanted and agreed, that *A.* should withdraw from the business, and permit *C.* and *J.* to use, occupy, and enjoy the distill house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by *C.* and *J.* to *A.* and his wife and the survivor; with liberty for *C.* and *J.*, on the decease of *A.* and his wife, to purchase the distill-house and premises for the remainder of *A.*'s term, and the stills, vats, &c. mentioned in the schedule: and *C.* and *J.* covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased: and there was a proviso for re-entry if the annuity were two months in arrear. Under this, *C.* and *J.* took possession of the premises, with the stills, vats, and utensils, and carried on the business, as before: and made payments of the annuity, which afterwards fell in arrear more than two months; but *A.*'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of *C.* and *J.* who continued in possession of the stills, vats, and utensils on the premises.—

On a question, whether such stills, vats, and utensils so continuing in possession of *C.* and *J.* the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom *A.* the owner was one, passed under the stat. 21 Jac. 1. c. 19. s. 10. and 11. to the assignees of *C.* and *J.*, as being in the possession, order and disposition, of the bankrupts at the time of their bankruptcy as reputed owners: and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership, (of which reputed ownership the jury are to judge from the circumstances;) held,

1. That the stills which were fixed to the freehold did not pass to the assignees under the words *goods and chattels* in the statute.

2. That the vats, &c. which were not so fixed, did pass to the assignees as being left by the true owner in the possession, order and disposition (as it appeared to the eye of the world) of the bankrupts as reputed owners.

3. That the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders; as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them. *Horn v. Baker*, H. 48 G. 3. 114

- 5 The costs of a suit in Chancery, directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the com-

- mission; but the bankrupt remains liable to be attached for the amount under the award made a rule of Court. *The King v. Davies*, H. 48 G. 8. 161
- 6 The departure of a trader from his dwelling-house, with intent to delay his creditors, is an act of bankruptcy, though no creditor be thereby in fact delayed. And the words in the stat. 1 Jac. 1. c. 15. s. 2. following this and other acts of bankruptcy committed, viz. "to the intent or whereby his creditors shall or may be defeated or delayed," &c. are to be read, "to the intent his creditors shall or whereby (or that thereby) they may be defeated," &c. But the lying in prison six months upon an arrest is made a substantive act of bankruptcy independent of any intent of the trader. So in the case of an act of bankruptcy by the trader's beginning to keep house the denial of a creditor is usually given in evidence, not to shew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he began to keep house with intent to delay his creditors. *Robertson v. Liddel*, E. 48 G. 3. 287
- 7 Goods sold and delivered upon an agreement to be paid for by a present bill payable at a future date does not create a present debt, on which to found a commission of bankrupt: nor can an action for goods sold and delivered be maintained by the vendor before the time when the bill agreed to be given would have come due, when the contract would be no longer executory. Neither can such executory contract, if such bill payable at a future day be actually given to secure it, found a good petitioning creditor's debt within the statutes 7 G. 1, c. 81, s. 1, and 5 G. 2. c. 80. s. 22, which are confined to debts due on bills, bonds, promissory notes, and other personal written securities of the like sort, payable at a future day; which alone by the latter statute are made available to found a good petitioning creditor's debt. *Hoskins v. Duperoy*, E. 48 G. 3. 242
- 8 A new assignee of a bankrupt may sue in debt upon judgment recovered by a former assignee, displaced by the Lord Chancellor, which judgment was "for damages sustained, for injuries committed as well by the defendant against the bankrupt before his bankruptcy, as also against the assignee as such, after the bankruptcy." For such recovery will be presumed to have been for injuries done to the bankrupt's estate and effects. And the plaintiff may declare in a general form as having been duly constituted and appointed assignee &c. *De Cosson v. Vaughn*, T. 48 G. 3. 286
- 9 A covenant in a charter party of affreightment to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter party. *Splitt v. Boules*, M. 49 G. 3. 885
- 10 Two of three partners affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home and afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners, having in the meantime committed acts of bankruptcy indorsed such bill to the creditors of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned; the other partner being all the time abroad. Held, first, That by such indorsement of the bill by the two, after acts of bankruptcy committed by them, though before the commissions issued, nothing passed to the creditor; for the bankrupt partners had by relation ceased at the time of such indorsement to have any control over the joint stock as partners, and therefore could not bind either the property of their assignees or of their solvent partner. 2dly, That the solvent partner might join with the assignees of the other two in maintaining an action for money had and received to recover back from the creditor the amount of the bill received by him from the acceptor. 3dly, That such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs *Thomson, jointly with Hiprip, and Others, Assignees of Underhill and Guest*, v. *Frere*, H. 49 G. 3. 447
- BASTARD.**
- See ORDER OF JUSTICES, 1.
- 1 One magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 G. 3. c. 44, though by the stat. 18 Eliz. c. 3, s. 2, jurisdiction over the subject-matter is given to two magistrates. *Weller v. Toke*, E. 48 G. 3. 364
- 2 A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, is removable as an unmarried woman under sect. 6, of stat. 35 G. 3. c. 101. *The King v. The Inhabitants of Tybhenham*, E. 48 G. 3. 192
- BEECH.**
See TIMBER, 1.
- BILLS OF EXCHANGE.**
- 1 A. and B. having exchanged their acceptances of bills drawn by each on the other

at so many days date; held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptance is) for 20 days, be post-dated without a new stamp, as upon new bills; 'although during all that time each had remained in the hands of the original drawer. *Cardwell v. Martin*, H. 48 G. 3. 102

- 2 Where the indorsee of a bill of exchange lodged it with his bankers, who presented it for payment on the 4th, when it was dishonoured; and on the 5th they returned it to the indorsee, who gave notice to the drawer of the dishonour on the 6th by the two-penny post: held such notice to be reasonable. *Scott v. Lifford*, E. 48 G. 3. 173

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PARTNER, 1.

- A promissory note for 100*l.* payable to plaintiff or order, and originally expressed to be for value received, generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the words for the good will of the lease and trade of Mr. K. deceased, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill v. Williams*, H. 49 G. 3. 493

BILL OF LADING.

- The property of goods passes by the indorsement and delivery of the bill of lading by the consignee to another bona fide for a valuable consideration, and without collusion with the consignee; although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived: and after such assignment of the bill of lading the consignor cannot stop the goods in transitu upon the insolvency of the original consignee. *Cuning v. Brown*, E. 48 G. 3. 246

BILLS OF LADING.

- Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of the homeward bound cargo, from Honduras Bay to London; and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's, into which they were carried by the recaptors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master acting bona fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners. Held

that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight pro rata itineris. But he could not recover against the ship-owners, upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves. *Hunter v. Prinsep*, M. 49 Geo. 3. 423

BOND.

See ANNUITY, 6.

- 1 To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been taken up, borrowed, and received by the defendants of the plaintiffs at respondentia interest, secured by a cargo of goods shipped from Calcutta to Ostend; it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the East-Indies, and illegally prepared by the plaintiffs for shipment from thence to beyond the Cape of Good-Hope, without the licence of the East-India Company; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money taken up, borrowed, and received, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond; but if it were inconsistent with it, the plea would still be good in this form. *Paxton v. Popham*, E. 48 G. 3. 201
- 2 An officer cannot commute for money the services of an impressed man, nor let him go for money; and a bond given to secure the man's return on non-payment of such money is void; and may be avoided by a plea disclosing the transaction, and shewing that the man was illegally impressed. *Pole v. Harrobin*, E. 22 G. 3. B. R. 205
- 3 The laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees,) in not properly examining his accounts for 8 or 9 years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel in law in an action against the sureties. *The Trent Navigation Company v. Hartley*, T. 48 G. 3. 274
- 4 The Prince of Wales having granted an annuity for his own life, payable by the treasurer of his privy purse, which annuity was assigned by the grantee to another with the Prince's assent: and a surety having given bond to the assignee of the annuity, conditioned to pay it, if the Prin

or the treasurer of his privy purse, or any other person for the Prince, did not pay it at the respective quarter-days; held that the surety was bound at all events at law by the terms of the obligation to pay it, if the Prince, &c. did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the Prince's treasurer, as required in all cases within the stat. 35 G. 3. c. 125. s. 7, on pain of being foreclosed of such demand; whatever equitable claim might be founded by the surety on such neglect. *O'Kelly v. Sparkes*, M. 49 G. 3. 424

BOOKS.

See EVIDENCE, 2, 3.

BUILDING ACT.

- 1 In trespass against the owner of a house adjoining to the plaintiff's in the metropolis for taking down his party wall and building on it, the defendant shewing at the trial that he was authorised in doing the thing complained of under the building act 14 Geo. 3. c. 78, is entitled to treble costs under the 10th section, upon a nonsuit. *Collins v. Poney*, H. 49 G. 3. 163
- 2 Where notice of pulling down and rebuilding a party wall was given under the building act 14 G. 3. c. 78, and the tenant of the adjoining house who was under covenant to repair finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house giving notice, in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same: held that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance: all the powers and authorities given by the act in respect of any works to be done, being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house. *Robinson v. Lewis*, T. 48 G. 3. 359

CARGO.

See SHIP, 4, 5.

CARRIAGES.

See TURNPIKE, 1.

CASE EXPLAINED.

- 1 *Molton v. Chessley*.

CHARITABLE USES.

See MORTMAIN, 1.

CHARTER-PARTY.

See ASSUMPSIT, 9, 10, 11.

- 1 The clauses in the *East India* company's charter-parties, whereby the Company agree to allow 200l. per month for provisions while the ship remains in *India* or *China*, to be computed from her delivery of the Company's dispatches (if any) at the ship's "*first consigned port*, until she should be dispatched from her *last port* in *India* or *China* to return to *Europe*," is to be understood of her *last consigned port*; and will not include the time which elapsed after her departure from *Canton* (which was her last consigned port according to her sailing instructions,) on her return to *Europe*, from which course she was driven by stress of weather, and forced to put into *Bombay* for repairs, before she was again dispatched for *Europe*. But after the ship was ready to sail again from *Bombay*, the Company having detained her two months longer for convoy before they again dispatched her for *Europe*, they paid the 200l. a-month for that period. And the 14l. covenanted to be paid by the Company to the ship owner in *England* for each passenger ordered on board the ship in *India* by the company's agents, is payable, notwithstanding the loss of the ship before her arrival in the *Thames*. *Moffat v. The East India Company*, H 49 G. 3. 465
- 2 A covenant in a charter-party of affreightment, that the owner shall at his expence forthwith make the ship tight and strong, &c. for a voyage for twelve months, &c. and keep her so, is not a condition precedent to the recovery of freight after the freighter had taken the ship into his service and used her for a certain period; but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. *Havelock v. Geddes*, H. 49 G. 3. 508
- 3 A ship having been let to freight for 12 months, and for such longer period as the freighter should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10, and 14 months, &c.; it is no answer to a breach for non-payment of six months' freight due at the end of 10 months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped goods on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months, and that he had paid the freight for all the

time she was serviceable, and that she was not in his service for 10 months in the whole: non-constit but that, after she had been used by the freighter, she wanted repair, without any default of the owner, or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair. *Havelock v. Geddes*, H. 49 G. 3. 508

- 4 The freight, being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from 4 months to 4 months, (after the first two months) and the ship were lost before the end of 14 months. *ib.*
- 5 An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid till the ship's discharge or return from her voyage; and the ship having sailed on a voyage to *St. Domingo*, where she arrived, but was burnt before her return; held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter; on which such extra allowance became payable. *ib.*

COAL MINE.

See COPYHOLD, 1.
COVENANT, 3.

COLLEGE.

See MORTMAIN, 1.

COMPOUNDING.

See MISDEMEANOR COMPOUNDING.

CONDITION PRECEDENT.

See CHARTER-PARTY, 2, 3, 5.
FREIGHT, 2, 6.

CONSUL.

See ARREST.

CONTRACT.

See TRADE, 1.

CONVEYANCE VOLUNTARY.

A voluntary settlement of lands made in consideration of natural love and affection is void as against a subsequent purchaser for a valuable consideration, though with notice of the prior settlement before all the purchase money was paid, or the deeds executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction: for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the stat. 27 Eliz. c. 4. *Doe d. Otley v. Manning*, M. 48 G. 3. 44

CONVICTION.

It is proper for a magistrate in
7 up a conviction on the stat. 5 Ann.

c. 14. to state the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of such evidence, in the words of the statute, yet a conviction in the latter form is valid in law: but the magistrate subjects himself to an information if he endeavor to shelter himself from detection by mis-stating such legal result when the evidence would not warrant it. *The King v. Pearce* E. 48 G. 3. 179

- 2 The statute 42 G. 3. forbids corn making into malt to be wetted while it is a-floor before 12 days from the time when it is emptied out of the cistern. Then stat. 46 G. 3. s. 1, repeals that provision generally, and enacts (sect. 3.) that the corn in that state shall not be wetted till 9 days, &c. after the 1st of August 1806. Then, sect. 14 enacts that this act shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st of August 1806, and shall continue in force till the 25th of March 1807. Held that incorporating the 14th with the 1st sect. this law only operated as a repeal of the former one during the time limited in the 14th section; after which the first resumed its operation during the interval between the 25th of March 1807, and a subsequent act reviving and continuing the 46 G. 3. *The King v. Rogers*, H. 49 G. 3. 514

COPPER.

See MINES, 3.

COPYHOLD.

See SURRENDER.

COPYHOLD AND CUSTOMARY ESTATES.

- 1 The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing. But where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, together with the liberty of boring for and getting the coal, &c., it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse the liberty of working the mines; because the plea claims such liberty not merely as annexed to the seisin in fee to be exercised when in actual possession, but as a present liberty to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid

- it. *Bourne v. Taylor*, T. 48 G. 8. 342
- 2 One who has a prima facie title to a copyhold is entitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time. *The King v. Lucas*, T. 48 G. 8. 363
- 3 Where a copyholder of inheritance, having power by custom to cut timber, surrendered to the use of his will, and devised to A. for life, without impeachment of waste, with remainders over; though there was no instance in fact of a copyholder for life in the manor cutting timber; yet the right being annexed to the fee and inheritance, the copyholder in fee in carving out his estate may make a tenant for life dispossessible of waste; and at any rate, the lord cannot enter upon the copyholder for life's estate, as for a forfeiture, upon his cutting timber; for the injury, if any, is to the remainderman of the inheritance. *Denn d. Jodrell v. Johnson*, M. 49 G. 8. 377
- 4 Entries on the rolls of a manor court, of admission of tenants in remainder after the determination of the estate of the last tenant's widow, who held during her chaste widowhood, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence; although there were no instances in fact stated on the rolls or known of such a forfeiture having been enforced. *Doe, dem. Askew v. Askew*, H. 49 G. 8. 492
- 5 A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of England, according to the custom of the manor; though the only evidence of such custom on the Rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance, by the general law of copyhold, and the title of a tenant by the curtesy being also by operation of law. *Doe d. Milner v. Brightwen*, H. 49 G. 8. 521
- 6 And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to the settlement, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death. *Doe d. Milner v. Brightwen*, H. 49 G. 8. 521
- And though 1-3d of the copyhold had been settled many years before upon a third person for life; but no surrender having

been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seized and admitted; and the steward of the manor, appointed by the heir at law and her husband, had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime,) for above 20 years back, debited himself with the receipt of 2-8ds of the rent for the husband on account of his wife, and the remaining 1-3d for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-8ds, as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. 521

Nor will any release from the heir at law living at the time of such curtesy estate be presumed during that period; nor after his death from the present heir at law, who might be called upon in equity to discover it, if given; though such release, if proved or presumed, would bar the copyholder's claim. *ibid.*

CORNWALL. See MINES, 3.

CORPORATION.

- 1 The charter of *Saltash* empowers the mayor, justice of the peace, and the rest of the aldermen, (seven in all,) or the major part of them, of whom the mayor and justice to be two, when it shall seem to them convenient and necessary, to elect as many free burgesses as shall please them, and to the same free burgesses so elected to administer an oath, &c. The defendant was elected a free burgess in October 1804, and in December 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor said was held for that sole purpose, the defendant tendered himself to be sworn in: against which 3 aldermen protested, one of whom immediately left the assembly; but before the other two protestors withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant. Held,
- 1st, That the swearing in of the burgess might well be at a time subsequent to the election; he having had a present legal capacity to be sworn in at the time of his election; and therefore not like the case of an infant elected.
- 2dly, That the act of swearing in, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of the majority of the mayor and aldermen.

by whom such act was required to be done, whensoever and howsoever assembled, and without any previous summons for this purpose; there being no dissent by the majority at the time when the oath was so administered.

3dly, Though three, an equal number of those first assembled, protested against the defendant's being sworn in when he first tendered himself to take the oath; yet one of the protestors having withdrawn, it was competent to the majority who remained to administer the oath: no vote having been come to by the major part at first assembled to preclude the body from doing the act at that meeting.

4thly, *Quære*, Whether, if it be found against a defendant in quo warranto, that, though duly elected, he was not duly sworn in, there can be any other judgment against him than of *ouster absolute*; there being no instance of a judgment of *ouster quousque*. *The King v. Courtenay*, H. 48 G. 3. 128

2 But where the new mayor of *New Romney* was required by charter to be sworn in before the old mayor, a swearing in by the town clerk, the usual officer to administer the oath, before the old mayor, but against the consent and direction of the latter, was held void. *Rez v. Ellis*, M. 8 G. 2. B. R. cited in *Rez v. Courtenay*. 131

3 The neglect to be sworn into an office for above 20 years after the party's election to it is evidence of his refusal to accept the office: as his acquiescence unexplained for so long time in the election of another person into the office is an evidence of his renunciation of it, and the acceptance of such renunciation by the body. *Rez v. Jordan*, tempore *Lord Hardwicke*, cited *ibid* 135

4 Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company v. Wilmot*, E. 48 G. 3. 180

5 One who has not taken the sacrament within a year, being incapable of being elected into a corporate office by stat. 13 Car. 2 c. 12. his disqualification was held not to be removed by the annual act of indemnity (47 G. 3 at. 2. c. 35.) the 6th sect. of which restrains its operation in cases where the office shall have been "already legally filled up and enjoyed by any other person," at the time of passing the act: the fact being, that the defendant and another were candidates at the time of election, when 40 electors were assembled; and after 2 electors had voted for each candidate, the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidate in the affir-

mative; whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted for the defendant, being 20 in number, except 2 or 3: and 16 afterwards voted for the other. Held,

1st, That all the votes given for the defendant after such notice were thrown away.

2dly, that the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes (not being equal in number to the good votes ultimately given for the other) had voted before such notice.

3dly, That the presumption of law being that every person has conformed to the law till something appear to rebut that presumption; it must be taken that the other candidate, who affirmed his qualification, which was not negatived by the jury, was duly qualified; and that such his election, perfected by swearing in, was filling up and enjoying by him of the office, with in the proviso of the indemnity act, so as to preclude its operation by relation in favor of the defendant. *The King v. Hawkins*, T. 48 G. 3. 352

CORRECTION, HOUSE OF.

See PRISONER, 1.

COSTS.

See DAMAGES AND COSTS.

- 1 In an order of filiation and maintenance the justices have no power by the stat. 18 Eliz. c. 3. to direct the defendant to pay the costs of the parish in obtaining the order; but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it. *The King v. Sweet*, M. 48 G. 3. 29
- 2 In trespass against the owner of a house adjoining to the plaintiff's in the metropolis, for taking down his party-wall and building on it, the defendant shewing at the trial that he was authorized in doing the thing complained of under the building act 14 G. 3. c. 78. is entitled to treble costs under the 10th section, upon a nonsuit. *Collins v. Poney*, H. 48 G. 3. 163
- 3 The costs of a suit in Chancery directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the commission; but the bankrupt remains liable to be attached for the amount under the award made a rule of court. *The King v. Davis*, H. 48 G. 3. 161
- 4 In a special count on a policy, the risk was stated to continue until the ship was unloaded, and there were common counts: held that the premium having been paid into court generally was an admission of the contract stated in the special count: and

- that it was not competent to the defendant to shew that the policy, by which the risk was originally made to cease after the ship was moored 24 hours in safety, was afterwards altered by the broker without the defendant's knowledge. But the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of costs; and the plaintiffs thereupon determining to take the money out of court, and not to proceed further, is entitled to all the costs of the action, and not merely to the usual costs of a new trial. *Andrews v. Palegrave*, H. 48 G. 3. 164
- 5 Where by the rule of reference the costs were to *abide the event* of an award: that includes the costs of the reference as well as of the cause. *Wood v. O'Kelly*, E. 48 G. 3. 214
- 6 An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to his costs on the stat. 8 & 9 W. 3. c. 11. s. 2. which is confined to judgments for defendants on demurrer. *Golding v. Dias*, T. 48 G. 3. 259
- 7 Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, are liable to costs; for the fact of their possession is immaterial, and they may sue in their own right. *Hollis v. Smith*, M. 49 G. 3. 390
- 8 After verdict for the defendant, and a new trial awarded upon a question of law, without any thing said as to costs; and instead of proceeding to a second trial, the parties agree to state the facts specially, as if in a case reserved at the trial; on which the postea is afterwards delivered to the plaintiffs; they are entitled to the costs of the first trial. *Robertson v. Liddell*, H. 49 G. 3. 237
- 9 Debt on bond, where the plaintiff recovers a verdict for nominal damages only, and takes his judgment for the penalty, is, not within the relief of the stat. 43 G. 3. c. 46. s. 3, enabling the Court to allow the defendant costs if the plaintiff do not recover the amount of the sum for which he had held the defendant to bail. *Connack v. Gregory*, H. 49 G. 3. 454

COVENANT.

See PLEADING, 16, 17.

- 1 A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellarbeer* field, instead of the *Allerbeer* field; being considered as part of the description of the deed declared on; though the plaintiff waived going for damages on the breach of that covenant; is fatal. *Pitt v. Green*, H. 48 G. 3. 101
- 2 In a lease of ground, with liberty to make a water course and erect a mill, the lessee

covenanted for himself, his executors, &c. and assigns, not to have persons to work in the mill who were settled in other parishes, without a parish certificate; held that this covenant did not run with the land, or bind the assignee of the lessee. *The Mayor, &c. of Congleton v. Pattison*, T. 48 G. 3. 316

- 3 In covenant on an indenture of demise of a coal mine, made on the 8th of July, 1805, reserving 1-4th of the coal raised, or the value in money, at the election of the lessor; and if the 1-4th fell short of 400*l.* per annum, then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions: held that the lessor having elected to take the whole in money may declare for two years and three months' rent in arrear. But even if the money rent were reserved annually, the plaintiff may remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the 1-4th, or the value in money, &c. but had refused, &c.; held that it would not hurt on general demurrer, that the count went on to allege, that before the exhibiting of the plaintiff's bill viz. on the 1st of November 1797, 100*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill 900*l.* of the rent reserved, &c. was due, is sufficient. *Buckley v. Kenyon*, T. 48 G. 3. 320

CRIM. CON.

See VENUE, 1.

CUSTOM.

See TIMBER, 1. Manor, 1.

Where a plea of justification in trespass for taking two horses, as heriots, stated a custom in the manor that the lord from time immemorial, until the division of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seized; and since the division the lord had taken and been accustomed to take on the death of every tenant dying seized of either of the moieties a heriot for each moiety; this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement before, and the other after the division of it: and being laid to be an immemorial custom, it is disproved by evidence that the division was made within memory. *Kingsmill, Bart v. Bull*, H. 48 G. 3. 100

DAMAGES AND COSTS.

In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods

under a writ of fieri facias, by which they were sold much under value, where, in stating the substance of the writ the count alleged that the sheriff was commanded to levy 80s. awarded to J. C. for his damages sustained by occasion of the detaining of the debt; that is proved by the writ which stated that the 80s. were awarded to J. C. for his damages sustained as well by reason of detaining the debt as for his costs, &c.; for costs are in legal sense included in the word damages. *Phillips v. Bacon*, H. 48 G. 3. 152

DAY-RULE.

A day rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the court on the same day; though the marshal were sued for the escape before the sitting of the court. *Field v. Jones*, M. 49 G. 3. 34

DEBTOR AND CREDITOR.

See INSURANCE OF LIFE, 1.

DEBT ON JUDGMENT.

See BANKRUPT, 8. PLEADING, 8.

DECLARATIONS—By deceased Persons.

See EVIDENCE, 2.

DEED.

See CONVEYANCE. SURRENDER, 1. OR, DESCRIPTION OF PERSONS, 1. SHIP, 5.

- 1 Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company v. Wilmot*, E. 48 G. 3. 180
- 2 A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the locus in quo under a deed of grant, by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proffered in court, of which the date and names of the parties are unknown. *Hendy v. Stephenson*, T. 48 G. 3. 383

DEMISE.

See LEASE.

DEMURRER.

See PLEADING, 20, 21.

DESCRIPTION OF PERSONS.

John Lealand surrendered a copyhold in the occupation of him *John Lealand* to the use of *Joseph Lealand* and *John Lealand* his son, for their lives and the life of the survivor; remainder to the heirs of the body of the said *John Lealand* son of *Joseph L.*;

remainder to the right heirs of the said *John Lealand*; held, that the ultimate remainder was meant for the right heirs of *John the surrenderor*; as well because *John the surrenderer* is before described with the addition of the son of *Joseph*; as of the manifest futility of giving *John the surrenderer* an estate tail, and afterwards a fee in succession. Though if the construction had been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe d. Hucknall v. Foster*, E. 48 G. 3. 200

DESERTER.

See SETTLEMENT BY HIRING AND SERVICE, 1.

DEVISE.

See MORTMAIN, 1.

- 1 One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and after their decease, in trust for all and every the child and children of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any issue, then after the decease of the survivor, in trust for her grandson, in fee, who was her heir at law: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the life-time of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; held that under the will and deeds of lease and release the three daughters took no legal estates, but that the release took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates in fee, as tenants in common. *Robinson v. Grey and Others*, M. 48 G. 3. 17
- 2 J. P. devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education, and support of his only daughter, until she should attain the age of 21 years, or marry; and when she should attain 21, or marry, then to her in fee: but in case his daughter should die under age and unmarried, then the estates to go to his wife for life; and, after her decease, to the two children of his nephew, as tenants in common in fee: with a proviso, that if either his wife or daughter should marry a Scotchman, then his wife or daughter so marrying should forfeit all benefit under his will, and the estates given to such his wife or daughter as should so marry should descend to such person or persons as would be entitled under his will, in the same manner as if his wife or daughter were dead. Held, that

such partial restraint of marriage was legal; and that the daughter having while under age married a *Scotchman* and died, leaving a son, such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the two children of the testator's nephew (which nephew was still living,) took effect immediately on such marriage; they being the persons designated by the will to take in the event which had happened; the testator having considered such prohibited marriage the same as the death of his daughter, under age, unmarried. *Perria v. Lyon*, M. 48 G. 3.

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- 3 Where there is no connexion by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and there being no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view.

Therefore, where the testator having a son married, and six grandsons and three grand-daughters, and three farms, devised all his lands to his son *for life*; and after his death gave to his eldest grandson *Thomas* (the defendant) the north side of *Down farm*, and to his grand-daughter *Frances* the south side of the same farm; and to his grandsons *George* and *Edmund*, and his grand-daughter *Elizabeth* "the upper part of *Lain farm*, equally between them so long as they should remain single; but if either married, then to have paid by the other two ten pounds a year for his or her life;" and to his grand-sons *Edward* and *John*, and his grand-daughters *Mary* and *Ann*, "the lower part of *Lain farm*, equally between them (which made them tenants in common) so long as they remained single; but if either married, then 10*l.* a-year (not saying to be paid by the others) for his or her life;" and then gave the third farm to another grandson: held, that on the marriage of *Edward*, *Mary* and *Ann*, their co-devisees of the lower part of the *Lain farm*, *John*, who remained single, could not recover the 3-4ths of the farm forfeited by their marriage, as upon the supposition that the 10*l.* a year for life to each of the devisees so marrying was to be paid by him who remained single; as in the corresponding devise of the other part of the *Lain farm*: but the 3-4ths may be chargeable with the annuities of 10*l.* a year to each in the hands of the heir at law, who was entitled to those shares.

Neither could the grandchildren take a fee by implication in the shares so devised to them generally, without words of limitation, merely from the circumstance

that an express estate *for life* was first given to the testator's son and heir at law. *Right d. Compton v. Compton*, H. 48 G. 3. 132

- 4 By a bequest of leasehold to *R.* until his (eldest) son *T.* shall attain 21, and no longer: but in case *T.* shall die in minority, then to *J.* or *O.* (his younger brothers) or either surviving or attaining 21, as aforesaid; with a desire that *R.* would quit and deliver up the premises as aforesaid, and confirming the bequest of them to *R.*'s family on his relinquishment of a certain claim, which he did relinquish: held, that *T.* on his attaining 21 took the estate by necessary implication; though there were a devise of the residue to *N.* the younger brother of *R.* *Goodright v. Hoskins*, H. 48 G. 3. 155

- 5 Under a devise to *A.* for life, remainder to *B.* and her heirs; but if *B.* die before *A.*, or if she die without heirs, of her body, then to *C.* and his heirs, &c.: held that the devise over to *C.* after *B.* could only take effect if *B.* died before *A.* and without issue; for that unless or were read as and the devise over would take if *B.* died before *A.*, although *B.* left issue; which would clearly be against the apparent intent of the deviser, which was to prefer the issue of *B.* to *C.* *Denn d. Wilkins v. Kemys*, E. 48 G. 3. 183

- 6 It seems that *freehold* may pass by a will giving the estate a local description and name, though it be mistakenly called *leasehold*; there being no other property answering to the name and description. *Id.*

- 7 Under a devise of lands to the testator's son *Joseph*, his heirs and assigns forever; but in case his son should die without issue, then, to go to the child of which his second wife was ensient; held, that *Joseph* took an estate tail. *Doe d. Ellis v. Ellis* E. 48 G. 3. 180

- 8 Under a devise of land to the two children of the testator's brother *W.*, when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage: but if either should die before 21, the survivor to be heir to the other: held that the fee passed, which would go over to the survivor in case one died under 21, and would descend or be disposable if he died after attaining 21: and that a devise of other land to the two children of another brother *R.* on the same condition as *W.*'s children, was governed by the same construction. *Doe d. Wright v. Cundall*, E. 48 G. 3. 189

- 9 One having a *freehold manor* of *Sutton*, and *freehold* lands there, and having also *copyhold* within the township of *Sutton* and within the local ambit of the manor, but held of another manor; and having surrendered his *copyhold* to the use of his will; devised all his manor of *S.*, and all his messuages, farms, lands, tene-

ments and hereditaments whatsoever, within the precincts and territories of *S.* in the county of *Chester*, with their rights, members, and appurtenances, in trust for his daughter *L.*, (having devised other estates in other counties to two other daughters,) and to her children in strict settlement: held, 1. That *farms*, lands, &c. within the township, though not within the manor of *Sutton*, passed by the description of *farms*, &c. within the precincts and territories of *S.* 2. That the general words "messuages, *farms*, lands, &c. and particularly the word *farms*, were sufficient to carry copyhold as well as freehold in the place described, if such appeared to be the intent of the testator upon the whole will." 3. That such intent was evinced in this case by the word *farms*, where it appeared that the testator had a farm composed of copyhold and freehold, which he had let as one entire subject, and which must otherwise be divided: and also by this, that he had charged the property devised be and the annual income of it, unless the copyhold were included. And that this intent was not rebutted by a power of leasing for 21 years given to all the tenants for life; nor by power to the trustees to raise portions by grants of long terms of years. 4. That a small copyhold distant 8 miles, and a small freehold 20 miles from *Sutton*, but within the county of *Chester*, did not pass by that devise, but did pass under a general residuary clause to another daughter. *Doe d. Belarise v. The Earl of Lucan*, E. 48 G. 8. 219

10 *A.*, having no issue, and being tenant in tail under the will of Dr. *G.*, with remainder to *B.* and *C.* for life, remainder to the heirs of their bodies, for such estates and in such proportions as they or the survivor should appoint, and in default of such appointment, remainder to the heirs of the body of *B.*, with remainders over; made his will, whereby, after devising certain estates to trustees to sell and apply the purchase money amongst different relations, and directing them to sell all other his real estates and apply the money to some of those relations; he gave *5l.* a-piece to *C.* (who survived *B.*) and to *D.* the only child of *B.* and *C.*, "in consideration of the ample provision made for them after my decease by Dr. *G.*, who has by his will devised to them certain estates in *R.*, now in my possession, which, though I could now legally dispose of, I mean fully to confirm to them; according to the intent of the said will." After this *A.* suffered a recovery, and declared the uses to himself for life, remainder to such persons and for such uses as he by deed, will, or codicil to be properly attested, should appoint; and for default of such appointment, to *C.* for life, remainder to *D.* for life, with remainder over in fee. After this he made a codicil, duly executed, whereby he confirmed his said will in all respects not thereby altered: and after mak-

ing some alterations in respect of other property, he declared such codicil to be part of his said will.

Held that *C.* and *D.* took nothing under the will and codicil of *A.* in the property which had belonged to Dr. *G.*: for it did not appear that *A.* intended by his will to devise the property in question, but rather to let it pass as it was devised by the will of Dr. *G.*: and his confirmation of his will by his codicil could not carry it further.

But even if he had intended to exercise a devising power by the will, according to the estates carved out by Dr. *G.*'s will for *C.* and *D.*, yet he afterwards altered that intent, and took a new estate in the premises, by suffering a recovery, the uses of which were different from those of Dr. *G.*'s will; reserving to himself a power of appointment by deed, will, or codicil; and when he executed a codicil afterwards, confirming his will in all respects, except where altered or revoked by his codicil, and then made specific alterations as to other parts of his property, without reference to his power, or to the property in question, (though such reference be not essentially necessary to the execution of a power, if it plainly appear that the party meant to execute it) nothing appeared to shew that he meant to execute the power by his codicil confirming his will generally, supposing it could take effect through the medium of such a will. *Lane v. Watkins*, M. 49 G. 8. 369

11 One devises all his freehold estate to his wife during her natural life, "and also at her disposal afterwards to leave it to whom she pleases:" held that this only gave her a power to leave it by will; and therefore that a disposition of it by feoffment in her lifetime was void. *Doe v. Thorley*, H. 49 G. 8. 456

12 Under a devise to the testatrix's daughter *E.* for life, remainder to her children and their heirs forever; but in case *E.* die without leaving any issue of her body, then to certain other grand-children, by other daughters, equally to be divided between them, share and share alike, as tenants in common: but in case of the death of either of her grand-children, under age and without leaving any issue the share of him or her so dying should be for the benefit of the survivors of the respective family, &c. Held that the grand-children took a fee in their respective shares, by reason of the devise over on their dying under age, with an executory devise over, if any of them died under 21. and without leaving issue at the time of their respective deaths; and therefore the limitation over was not too remote. *Toovey v. Bassell*, H. 49 G. 8. 466

13 Under a devise to *H.* of certain tenements by name for her life; provided that if *S.* and *A.* (to whom and to whose children the reversion and inheritance of the premises were intended if *H.* should die with

out issue) should give *H. 1000l.* for her life estate, then the testator devised all and singular the said estate and premises called, &c. to *S.* and *A.* for their lives, share and share alike; and on the death of either, their moiety unto and among the children of the survivor and their heirs, share and share alike, &c. as tenants in common, &c. provided that if *H.* should die in possession of the premises single and without issue, then he gave the said estate and premises to *S.* and *A.*, and to the issue of their bodies lawfully begotten or to be begotten, and their heirs, as tenants in common AS AFORESAID; held that the words as aforesaid drew down to the second clause the limitations of the first, and shewed that the testator meant that *S.* and *A.* and their children should take the same estates on *H.* dying in possession without issue, as they would have done if the 1000*l.* had been paid. And held also, that a younger child of *A.* born after the death of the testator, and before the death of *H.* and *S.* (who died without issue) was entitled to share in the moieties both of *S.* and of *A.*; and that the eldest son of *A.* was also entitled to share in both moieties, though he died before *A.*; and on his death the share in *S.*'s moiety descended immediately to his next brother and heir at law, as did also his share in *A.*'s moiety, on her death after him. *Mereditth v. Mereditth*, H. 49 G. 3. 485

- 14 Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock; including as to six of the estates, three several lives in succession on each estate; and as to the seventh, (which in the first instance was only limited to two persons for life in succession,) giving those two a power "to add another life or lives to make three, in like manner as after mentioned for other persons to do the same;" and then giving this general power, "that when and so often as the lives on either of the estates before given shall be by death reduced to two, that then it shall be in the power of the person or persons then enjoying the said estate or estates to renew the same with the person or persons to whom the revenue thereof shall belong, by adding a third life in such estate, and paying such reversioner two years' purchase for such renewal; and also to exchange either of the said two lives, on payment of one years' purchase;" held that the power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life. *Doe dem. Hardwicke v. Hardwicke*, H. 49 G. 3. 506

DILAPIDATIONS.

See MORTMAIN, 1.

DOGS.

See ACTION ON THE CASE, 1.

EAST-INDIA COMPANY.

See CHARTER-PARTY, 1.

EJECTMENT.

See LANDLORD AND TENANT.

- 1 Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 Hen 7. c. 24, it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law; but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe v. Watts*, M. 49 G. 3. 24
- 2 One having good title to the possession of a copyhold, as tenant by the curtesy, by the custom of the manor; his possession of the copyhold after his wife's death, will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death, though more than 20 years after the death of the wife *Doe dem. Sir William Milner, Bart v. Brightwen*, H. 49 G. 3. 521
- 3 And though 1-8d of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seized and admitted; and the steward of the manor appointed by the heir at law and her husband had in his accounts after the wife's death (which was evidence of his having done the same in her life time,) for above 20 years back, debited himself with the receipt of 2-8ds of the rent for the husband on account of his wife, and the remaining 1-8d for such person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-8d, distinct from his possession of the other 2-8ds as tenant by the curtesy after the wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. *Doe dem. Sir William Milner, Bart. v. Brightwen*, H. 49 G. 3. 521

EMANCIPATION.

See SETTLEMENT—By Hiring and Service, 2.

EMBARGO.

See FREIGHT, 7. INSURANCE, 9.

ENEMY.

See TRADE, 1.

day of term, being the return day of the writ, and the under-sheriff signified his assent to the surrender by return of post the next day, at the distance of 17 miles; held sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment afterwards, with notice of such surrender. *Plimpton v. Howel*. T. 48 G. 3.

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BANKER.

See *INFRA* BANKRUPT, 1.

BANK NOTES.

See *EXECUTION*, 1.

BANKRUPT.

- 1 A customer paying bills, not due, into his bankers in the country, whose custom it was to credit their customers for the amount of such bills, if approved as cash, (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy; and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received. *Giles v. Perkins and Others, Assignees of Dickenson and Others*, M. 48 G. 3. 22
- 2 Neither the bankrupt, nor any person claiming from him by assignment subsequent to the commission of bankruptcy, shall be permitted in an action at law to question the validity of such commission, and recover from the assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out. *Donovan, Assignee of Kennet an Insolvent Debtor, v. Duff, Assignee of the same Kennet, under a Commission of Bankrupt*, M. 48 G. 3. 26
- 3 The certificate of a bankrupt allowed after the filing of the plaintiff's bill and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 G. 2. c. 30. s. 7. viz. that before the exhibiting of the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt. *Harris v. James*, M. 48 G. 3. 54
- 4 *A., B., and C., partners and distillers, occupied certain premises leased to A. and another and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises; and by deed between the two last and*

A. it was covenanted and agreed, that *A.* should withdraw from the business, and permit *C.* and *J.* to use, occupy, and enjoy the distill house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by *C.* and *J.* to *A.* and his wife and the survivor; with liberty for *C.* and *J.*, on the decease of *A.* and his wife, to purchase the distill-house and premises for the remainder of *A.*'s term, and the stills, vats, &c. mentioned in the schedule: and *C.* and *J.* covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased: and there was a proviso for re-entry if the annuity were two months in arrear. Under this, *C.* and *J.* took possession of the premises, with the stills, vats, and utensils, and carried on the business, as before: and made payments of the annuity, which afterwards fell in arrear more than two months; but *A.*'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of *C.* and *J.* who continued in possession of the stills, vats, and utensils on the premises.—

On a question, whether such stills, vats, and utensils so continuing in possession of *C.* and *J.* the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom *A.* the owner was one, passed under the stat. 21 Jac. 1. c. 19. s. 10. and 11. to the assignees of *C.* and *J.*, as being in the possession, order and disposition, of the bankrupts at the time of their bankruptcy as reputed owners: and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership, (of which reputed ownership the jury are to judge from the circumstances;) held,

1. That the stills which were fixed to the freehold did not pass to the assignees under the words *goods and chattels* in the statute.

2. That the vats, &c. which were not so fixed, did pass to the assignees as being left by the true owner in the possession, order and disposition (as it appeared to the eye of the world) of the bankrupts as reputed owners.

3. That the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders; as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them. *Horn v. Baker*, H. 48 G. 3. 114

- 5 The costs of a suit in Chancery, directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the com-

- mission; but the bankrupt remains liable to be attached for the amount under the award made a rule of Court. *The King v. Davies*, H. 49 G. 8. 161
- 6 The departure of a trader from his dwelling-house, with intent to delay his creditors, is an act of bankruptcy, though no creditor be thereby in fact delayed. And the words in the stat. 1 Jac. 1. c. 15. s. 2. following this and other acts of bankruptcy committed, viz. "to the intent or whereby his creditors shall or may be defeated or delayed," &c. are to be read, "to the intent his creditors shall or whereby (or that thereby) they may be defeated," &c. But the lying in prison six months upon an arrest is made a substantive act of bankruptcy independent of any intent of the trader. So in the case of an act of bankruptcy by the trader's beginning to keep house the denial of a creditor is usually given in evidence, not to shew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he began to keep house with intent to delay his creditors. *Robertson v. Liddel*, E. 48 G. 8. 287
- 7 Goods sold and delivered upon an agreement to be paid for by a present bill payable at a future date does not create a present debt, on which to found a commission of bankruptcy: nor can an action for goods sold and delivered be maintained by the vendor before the time when the bill agreed to be given would have come due, when the contract would be no longer executory. Neither can such executory contract, if such bill payable at a future day be actually given to secure it, found a good petitioning creditor's debt within the statutes 7 G. 1. c. 31. s. 1, and 5 G. 2. c. 30. s. 22, which are confined to debts due on bills, bonds, promissory notes, and other personal written securities of the like sort, payable at a future day; which alone by the latter statute are made available to found a good petitioning creditor's debt. *Hoskins v. Duperoy*, E. 48 G. 8. 242
- 8 A new assignee of a bankrupt may sue in debt upon judgment recovered by a former assignee, displaced by the Lord Chancellor, which judgment was "for damages sustained, for injuries committed as well by the defendant against the bankrupt before his bankruptcy, as also against the assignee as such, after the bankruptcy." For such recovery will be presumed to have been for injuries done to the bankrupt's estate and effects. And the plaintiff may declare in a general form as having been duly constituted and appointed assignee &c. *De Cossan v. Vaughan*, T. 48 G. 8. 286
- 9 A covenant in a charter party of affreightment to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter party. *Splidt v. Boules*, M. 49 G. 8. 885
- 10 Two of three partners affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home and afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners, having in the meantime committed acts of bankruptcy indorsed such bill to the creditors of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned; the other partner being all the time abroad. Held, first, That by such indorsement of the bill by the two, after acts of bankruptcy committed by them, though before the commissions issued, nothing passed to the creditor; for the bankrupt partners had by relation ceased at the time of such indorsement to have any controul over the joint stock as partners, and therefore could not bind either the property of their assignees or of their solvent partner. 2dly, That the solvent partner might join with the assignees of the other two in maintaining an action for money had and received to recover back from the creditor the amount of the bill received by him from the acceptor. 3dly, That such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs. *Thomason, jointly with Hippis, and Others, Assignees of Underhill and Guest*, v. *Frere*, H. 49 G. 8. 447
- BASTARD.**
- See ORDER OF JUSTICES, 1.
- 1 One magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 G. 3. c. 44, though by the stat. 18 Eliz. c. 8, s. 2, jurisdiction over the subject-matter is given to two magistrates. *Weller v. Toke*, E. 48 G. 8. 364
- 2 A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, is removable as an unmarried woman under sect. 6, of stat. 35 G. 3. c. 101. *The King v. The Inhabitants of Tibbenham*, E. 48 G. 8. 192
- BEECH.**
See **TIMBER**, 1.
- BILLS OF EXCHANGE.**
- 1 *A.* and *B.* having exchanged their acceptances of bills drawn by each on the other

at so many days date; held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptance is) for 20 days, be post-dated without a new stamp, as upon new bills; although during all that time each had remained in the hands of the original drawer. *Cardwell v. Martin*, H. 48 G. 3. 102

- 2 Where the indorsee of a bill of exchange lodged it with his bankers, who presented it for payment on the 4th, when it was dishonoured; and on the 5th they returned it to the indorsee, who gave notice to the drawer of the dishonour on the 6th by the two-penny post: held such notice to be reasonable. *Scott v. Lifford*, E. 48 G. 3. 178

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PARTNER, 1.

- A promissory note for 100*l.* payable to plaintiff or order, and originally expressed to be for *value received*, generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the words *for the good will of the lease and trade of Mr. K. deceased*, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill v. Williams*, H. 49 G. 3. 498

BILL OF LADING.

- The property of goods passes by the indorsement and delivery of the bill of lading by the consignee to another bona fide for a valuable consideration, and without collusion with the consignee; although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived: and after such assignment of the bill of lading the consignor cannot stop the goods in transitu upon the insolvency of the original consignee. *Cuming v. Brown*, E. 48 G. 3. 245

BILLS OF LADING.

- Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of the homeward bound cargo, from Honduras Bay to London; and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's, into which they were carried by the recaptors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master acting bona fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners. Held

that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight pro rata itineris. But he could not recover against the ship-owners, upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves. *Hunter v. Prinsep*, M. 49 Geo. 3. 423

BOND.

See ANNUITY, 6.

- 1 To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at respondentia interest, secured by a cargo of goods shipped from Calcutta to Ostend; it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the *East-Indies*, and illegally prepared by the plaintiffs for shipment from thence to beyond the Cape of Good-Hope, without the licence of the *East-India Company*; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond; but if it were inconsistent with it, the plea would still be good in this form. *Paxton v. Popham*, E. 48 G. 3. 201
- 2 An officer cannot commute for money the services of an impressed man, nor let him go for money; and a bond given to secure the man's return on non-payment of such money is void; and may be avoided by a plea disclosing the transaction, and shewing that the man was illegally impressed. *Pole v. Harrobin*, E. 22 G. 3. B. R. 205
- 3 The laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees,) in not properly examining his accounts for 8 or 9 years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel in law in an action against the sureties. *The Trent Navigation Company v. Harley*, T. 48 G. 3. 274
- 4 The Prince of Wales having granted an annuity for his own life, payable by the treasurer of his privy purse, which annuity was assigned by the grantee to another with the Prince's assent: and a surety having given bond to the assignee of the annuity, conditioned to pay it, if the Prin

or the treasurer of his privy purse, or any other person for the Prince, did not pay it at the respective quarter-days; held that the surety was bound at all events at law by the terms of the obligation to pay it, if the Prince, &c. did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the Prince's treasurer, as required in all cases within the stat. 35 G. 3. c. 125. s. 7, on pain of being foreclosed of such demand; whatever equitable claim might be founded by the surety on such neglect. *O'Kelly v. Sparkes*, M. 49 G. 3. 424

BOOKS.

See EVIDENCE, 2, 3.

BUILDING ACT.

- 1 In trespass against the owner of a house adjoining to the plaintiff's in the metropolis for taking down his party wall and building on it, the defendant shewing at the trial that he was authorised in doing the thing complained of under the building act 14 Geo. 3. c. 78, is entitled to treble costs under the 10th section, upon a nonsuit. *Collins v. Poney*, H. 48 G. 3. 163
- 2 Where notice of pulling down and rebuilding a party wall was given under the building act 14 G. 3. c. 78, and the tenant of the adjoining house who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscoat and partitions of it, instead of leaving such expences to be incurred and paid by the owner of the house giving notice, in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same: held that he could not recover over against his landlord such expences incurred by his own orders, and paid for by him in the first instance: all the powers and authorities given by the act in respect of any works to be done, being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house. *Robinson v. Lewis*, T. 48 G. 3. 359

CARGO.

See SHIP, 4, 5.

CARRIAGES.

See TURNPIKE, 1.

CASE EXPLAINED.

- 1 *Molton v. Cheesley*.

CHARITABLE USES.

See MORTMAIN, 1.

CHARTER-PARTY.

See ASSUMPSIT, 9, 10, 21.

- 1 The clauses in the *East India* company's charter-parties, whereby the Company agree to allow 200l. per month for provisions while the ship remains in *India* or *China*, to be computed from her delivery of the Company's dispatches (if any) at the ship's "*first consignee's port*, until she should be dispatched from her *last port* in *India* or *China* to return to *Europe*," is to be understood of her *last consigned port*; and will not include the time which elapsed after her departure from *Canton* (which was her last consigned port according to her sailing instructions,) on her return to *Europe*, from which course she was driven by stress of weather, and forced to put into *Bombay* for repairs, before she was again dispatched for *Europe*. But after the ship was ready to sail again from *Bombay*, the Company having detained her two months longer for convoy before they again dispatched her for *Europe*, they paid the 200l. a-month for that period. And the 14l. covenanted to be paid by the Company to the ship owner in *England* for each passenger ordered on board the ship in *India* by the company's agents, is payable, notwithstanding the loss of the ship before her arrival in the *Thames*. *Moffat v. The East India Company*, H 49 G. 3. 465
- 2 A covenant in a charter-party of affreightment, that the owner shall at his expence forthwith make the ship tight and strong, &c. for a voyage for twelve months, &c. and keep her so, is not a condition precedent to the recovery of freight after the freighter had taken the ship into his service and used her for a certain period; but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. *Havelock v. Geddes*, H. 49 G. 3. 508
- 3 A ship having been let to freight for 12 months, and for such longer period as the freighter should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10, and 14 months, &c.; it is no answer to a breach for non-payment of six months' freight due at the end of 10 months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped goods on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unseaworthy for part of the six months, and that he had paid the freight for all the

- Landey*, M. 48 G. 3. 89
- 3 The law will not raise an assumpsit upon a judgment by default in one of the colonies against a party, who upon the face of the proceedings appeared only to have been summoned "by nailing up a copy of the declaration at the court-house door;" it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time of the suit commenced or afterwards: although by a law of the colony if a defendant be absent from the island, and have no attorney, manager, or overseer there, such mode of summoning him shall be deemed good service: for the absence thereby intended is of one who had been present and subject to the jurisdiction: though even if it had been meant to reach strangers to the jurisdiction, it would not have bound them. *Buchanan v. Rucker*, H. 48 G. 3. 103
- 4 Proof that the defendant agreed to sell his horse warranted sound to the plaintiff for 31l. 10s., and at the same time agreed that if the plaintiff would take the horse at that value, he the defendant, would buy another horse of the plaintiff's brother, for 14l. 14s., and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31l. 10s., the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the said 31l. 10s. *Hands v. Burton*, E. 48 G. 3. 175
- 5 Where money in litigation between two parties has by mutual consent been paid over to a trustee, in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to waive all objections to form. *Ker v. Osborne*, E. 48 G. 3. 158
- 6 A wagering contract for 50 guineas, that the plaintiff would not marry within six years, is prima facie in restraint of marriage, and therefore void, no circumstances appearing to shew that such restraint was prudent and proper in the particular instance. *Hartley v. Rice*, T. 48 G. 3. 268
- 7 A collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate, no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5l. inclosed in a letter to the plaintiff, in which he stated that she should have the remainder next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for tolls. *Peacock v. Harris*, T. 48 G. 3. 305
- 8 The authority of one partner to bind another, by signing bills of exchange and promissory notes in their joint names, is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. *Lord Viscount Gallway v. Mathew and Another*, M. 49 G. 3. 876
- 9 Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of the homeward bound cargo, from Honduras Bay to London; and the ship and cargo, after capture and recapture, having been wrecked at St. Kitts, into which they were carried by the recaptors, a sale of the cargo was directed by the vice admiralty court there, on the application of the master acting bona fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners. Held that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight pro rata itineris. For such form of action for the proceeds of an illegal sale of goods is only a waiver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods, (subject to the legal consequences of considering the demand as a debt; which admits of a set-off, &c.) but does not recognise the right of the vendor so as to convert the goods. And here the act of conversion, (for such it must be taken to be) being made by the master who is the general agent of the ship owners, (and not as in *Bellie v. Modigliani* by the act of a court of competent jurisdiction,) was unlawful, and discharged the claim of the ship-owners for freight pro rata itineris. *Hunter v. Princep*, M. 49 G. 3. 428
- 10 But the plaintiff could not recover against the ship owners, upon special counts framed upon the bills of lading signed by the master, as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject matter by a contract not under seal, and signed by their master only, and not by themselves. *Ibid.*
- 11 Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship to freight to the defendants on a voyage from Shields to Lisbon with convoy; the freight to be paid on right delivery of the

cargo; the ship having sailed from *Shields* with her cargo, and joined convoy at *Portsmouth*; and after being detained near a month off *Lymington*, her sailing orders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants, have refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant, and then was sold by consent of both parties without prejudice: held that the plaintiff could not recover freight pro rata or demurrage. *Liddard v. Lopes*, H. 49 G. 3. 495

- 7 The master and the freighter of a vessel of 400 tons having mutually agreed in writing, that the ship being fitted for the voyage, should proceed to *St. Petersburg*, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to *London* and deliver the same, on being paid freight, &c.: held that the master, after taking in at *St. P.* about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on *British* ships by the *Russian* government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted bona fide and under a reasonable and well grounded apprehension at the time; and the hostile embargo and seizure was in fact laid on six weeks afterwards. *Atkinson v. Ritchie*, H. 49 G. 3. 891

ATTACHMENT.

See INSOLVENT DEBTOR, 1.

ATTORNEY.

An attorney of *B. R.* in pleading his privilege against being sued by original, improperly stated the custom of this court to be not to compel its attorneys to answer an original writ, unless first forejudged from their office, &c. (which is the custom in *C. B.* but not in this court:) but held that enough appearing to sustain the plea, the custom which had no foundation here (of which the court would take notice) might be rejected as surplusage. *Stokes v. Muson*, E. 48 G. 3. 208

AUTERFOITS ACQUIT.

One was indicted in *Middlesex* for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a prout patet by the affidavit affiled in the court of *B. R.* at *Westminster*, &c. and on this he was acquitted: after which he was indicted again in *Middlesex* for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in *London*; which was traversed by an averment that in fact the defendant was so sworn in *Middlesex* and not in *London*: and held that he was entitled to plead auterfoits acquit; for the jurat was

not conclusive as to the place of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence. *The King v. Emden*, E. 48 G. 3. 214

AUTHORITY.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor; which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the court-house for the use of the poor; may at any rate countermand the application of the money before it is so applied, and may recover it back in an action for money had and received. *Taylor v. Lendey*, M. 48 G. 3. 89

AWARD.

- 1 An award, that certain actions be discontinued, and each party pay his own costs, is final and good; being in effect an award of a stet processus. *Blanchard v. Lilly*, E. 48 G. 3. 241
- 2 Where by the rule of reference the costs were to abide the event of an award; that includes the costs of the reference as well as of the cause. *Wood v. O'Kelly*, E. 48 G. 3. 214

BAIL.

- 1 None can be holden to special bail in detention or trover without a judge's order. *Reg. Gen. H.* 48 G. 3. 325
- 2 Bail above having been put in and exception entered in the vacation, notice of justification for the first day of the next term must be given within 4 days after such exception. *Milison v. King*, E. 48 G. 3. 213

BAIL IN ERROR.

Bail in error is not necessary upon the stat. 3 Jac. 1. c. 8. in debt on bond conditioned for the payment of money, and also for performing covenants in a mortgage del. *Butler v. Brushfield*, M. 49 G. 3. 441

BAIL BOND.

- 1 Where the writ was to appear before the King wheresoever he should then be in England, and the sheriff took a bail bond for the party's appearance before the King at *Westminster* on the day named in the writ; held to be a substantial compliance with the stat. 23 H. 6. c. 9. so as to entitle the assignee of the sheriff to recover on such bond. *Jones v. Sturdy*, M. 48 G. 3. 42
- 2 Where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first

day of term, being the return day of the writ, and the under-sheriff signified his assent to the surrender by return of post the next day, at the distance of 17 miles; held sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment afterwards, with notice of such surrender. *Plimpton v. Howel*, T. 48 G. 3.

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BANKER.

See *INFRA* BANKRUPT, 1.

BANK NOTES.

See *EXECUTION*, 1.

BANKRUPT.

- 1 A customer paying bills, not due, into his bankers in the country, whose custom it was to credit their customers for the amount of such bills, if approved as cash, (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy; and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received. *Giles v. Perkins and Others, Assignees of Dickenson and Others*, M. 48 G. 3. 22
- 2 Neither the bankrupt, nor any person claiming from him by assignment subsequent to the commission of bankruptcy, shall be permitted in an action at law to question the validity of such commission, and recover from the assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out. *Donovan, Assignee of Kennel an Insolvent Debtor, v. Duff, Assignee of the same Kennel, under a Commission of Bankrupt*, M. 48 G. 3. 26
- 3 The certificate of a bankrupt allowed after the filing of the plaintiff's bill and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 G. 2. c. 30. s. 7. viz. that before the exhibiting of the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt. *Harris v. James*, M. 48 G. 3. 54
- 4 A., B., and C., partners and distillers, occupied certain premises leased to A. and another and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises; and by deed between the two last and

A. it was covenanted and agreed, that A. should withdraw from the business, and permit C. and J. to use, occupy, and enjoy the distill house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A. and his wife and the survivor; with liberty for C. and J., on the decease of A. and his wife, to purchase the distill-house and premises for the remainder of A.'s term, and the stills, vats, &c. mentioned in the schedule: and C. and J. covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased: and there was a proviso for re-entry if the annuity were two months in arrear. Under this, C. and J. took possession of the premises, with the stills, vats, and utensils, and carried on the business, as before: and made payments of the annuity, which afterwards fell in arrear more than two months; but A.'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J. who continued in possession of the stills, vats, and utensils on the premises.—

On a question, whether such stills, vats, and utensils so continuing in possession of C. and J. the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom A. the owner was one, passed under the stat. 21 Jac. 1. c. 19. s. 10. and 11. to the assignees of C. and J., as being in the possession, order and disposition, of the bankrupts at the time of their bankruptcy as reputed owners: and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership, (of which reputed ownership the jury are to judge from the circumstances;) held,

1. That the stills which were fixed to the freehold did not pass to the assignees under the words *goods and chattels* in the statute.

2. That the vats, &c. which were not so fixed, did pass to the assignees as being left by the true owner in the possession, order and disposition (as it appeared to the eye of the world) of the bankrupts as reputed owners.

3. That the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders; as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them. *Horn v. Baker*, H. 48 G. 3. 114

- 5 The costs of a suit in Chancery, directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the com-

- mission; but the bankrupt remains liable to be attached for the amount under the award made a rule of Court. *The King v. Davies*, H. 48 G. 8. 161
- 6 The departure of a trader from his dwelling-house, with intent to delay his creditors, is an act of bankruptcy, though no creditor be thereby in fact delayed. And the words in the stat. 1 Jac. 1. c. 15. s. 2. following this and other acts of bankruptcy committed, viz. "to the intent or whereby his creditors shall or may be defeated or delayed," &c. are to be read, "to the intent his creditors shall or whereby (or that thereby) they may be defeated," &c. But the lying in prison six months upon an arrest is made a substantive act of bankruptcy independent of any intent of the trader. So in the case of an act of bankruptcy by the trader's beginning to keep house the denial of a creditor is usually given in evidence, not to shew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he began to keep house with intent to delay his creditors. *Robertson v. Liddel*, E. 48 G. 3. 237
- 7 Goods sold and delivered upon an agreement to be paid for by a present bill payable at a future date does not create a present debt, on which to found a commission of bankrupt: nor can an action for goods sold and delivered be maintained by the vendor before the time when the bill agreed to be given would have come due, when the contract would be no longer executory. Neither can such executory contract, if such bill payable at a future day be actually given to secure it, found a good petitioning creditor's debt within the statutes 7 G. 1. c. 31, s. 1, and 5 G. 2. c. 30. s. 22, which are confined to debts due on bills, bonds, promissory notes, and other personal written securities of the like sort, payable at a future day; which alone by the latter statute are made available to found a good petitioning creditor's debt. *Hoskins v. Duperoy*, E. 48 G. 3. 242
- 8 A new assignee of a bankrupt may sue in debt upon judgment recovered by a former assignee, displaced by the Lord Chancellor, which judgment was "for damages sustained, for injuries committed as well by the defendant against the bankrupt before his bankruptcy, as also against the assignee as such, after the bankruptcy." For such recovery will be presumed to have been for injuries done to the bankrupt's estate and effects. And the plaintiff may declare in a general form as having been duly constituted and appointed assignee &c. *De Cosson v. Vaughan*, T. 48 G. 3. 286
- 9 A covenant in a charter party of affreightment to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter party. *Splid v. Boules*, M. 49 G. 3. 885
- 10 Two of three partners affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home and afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners, having in the meantime committed acts of bankruptcy indorsed such bill to the creditors of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned; the other partner being all the time abroad. Held, first, That by such indorsement of the bill by the two, after acts of bankruptcy committed by them, though before the commissions issued, nothing passed to the creditor; for the bankrupt partners had by relation ceased at the time of such indorsement to have any controul over the joint stock as partners, and therefore could not bind either the property of their assignees or of their solvent partner. 2dly, That the solvent partner might join with the assignees of the other two in maintaining an action for money had and received to recover back from the creditor the amount of the bill received by him from the acceptor. 3dly, That such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs *Thomason, jointly with Hipkip, and Others, Assignees of Underhill and Guest*, v. *Frere*, H. 49 G. 3. 447
- BASTARD.**
- See ORDER OF JUSTICES, 1.
- 1 One magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 G. 3. c. 44, though by the stat. 18 Eliz. c. 3, s. 2, jurisdiction over the subject-matter is given to two magistrates. *Weller v. Toke*, E. 48 G. 3. 364
- 2 A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, is removable as an unmarried woman under sect. 6, of stat. 35 G. 3. c. 101. *The King v. The Inhabitants of Tibbenham*, E. 48 G. 3. 192
- BEECH.**
See TIMBER, 1.
- BILLS OF EXCHANGE.**
- 1 A. and B. having exchanged their acceptances of bills drawn by each on the other

at so many days date; held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptance is) for 20 days, be post-dated without a new stamp, as upon new bills; 'although' during all that time each had remained in the hands of the original drawer. *Cardwell v. Martin*, H. 48 G. 3. 102

- 2 Where the indorsee of a bill of exchange lodged it with his bankers, who presented it for payment on the 4th, when it was dishonoured; and on the 5th they returned it to the indorsee, who gave notice to the drawer of the dishonour on the 6th by the two-penny post: held such notice to be reasonable. *Scott v. Lifford*, E. 48 G. 3. 173

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PARTNER, 1.

- A promissory note for 100*l.* payable to plaintiff or order, and originally expressed to be for *value received*, generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the words for the *good will of the lease and trade of Mr. K. deceased*, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill v. Williams*, H. 49 G. 3. 493

BILL OF LADING.

- The property of goods passes by the indorsement and delivery of the bill of lading by the consignee to another bona fide for a valuable consideration, and without collusion with the consignee; although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived: and after such assignment of the bill of lading the consignor cannot stop the goods in transitu upon the insolvency of the original consignee. *Cuning v. Brown*, E. 48 G. 3. 245

BILLS OF LADING.

- Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of the homeward bound cargo, from Honduras Bay to London; and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's, into which they were carried by the recaptors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master acting bona fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners. Held

that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight pro rata itineris. But he could not recover against the ship-owners, upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves. *Hunter v. Princep*, M. 49 Geo. 3. 423

BOND.

See ANNUITY, 6.

- 1 To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been taken up, borrowed, and received by the defendants of the plaintiffs at respondentia interest, secured by a cargo of goods shipped from Calcutta to Ostend; it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the *East-Indies*, and illegally prepared by the plaintiffs for shipment from thence to beyond the Cape of Good-Hope, without the licence of the *East-India Company*; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money taken up, borrowed, and received, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond; but if it were inconsistent with it, the plea would still be good in this form. *Paxton v. Popham*, E. 48 G. 3. 201
- 2 An officer cannot commute for money the services of an impressed man, nor let him go for money; and a bond given to secure the man's return on non-payment of such money is void; and may be avoided by a plea disclosing the transaction, and shewing that the man was illegally impressed. *Pole v. Harrobin*, E. 22 G. 3. B. R. 205
- 3 The laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees,) in not properly examining his accounts for 8 or 9 years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel in law in an action against the sureties. *The Trent Navigation Company v. Harley*, T. 48 G. 3. 274
- 4 The Prince of Wales having granted an annuity for his own life, payable by the treasurer of his privy purse, which annuity was assigned by the grantee to another with the Prince's assent: and a surety having given bond to the assignee of the annuity, conditioned to pay it, if the Prin

or the treasurer of his privy purse, or any other person for the Prince, did not pay it at the respective quarter-days; held that the surety was bound at all events at law by the terms of the obligation to pay it, if the Prince, &c. did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the Prince's treasurer, as required in all cases within the stat. 35 G. 3. c. 125. s. 7, on pain of being foreclosed of such demand; whatever equitable claim might be founded by the surety on such neglect. *O'Kelly v. Sparkes*, M. 49 G. 3. 424

BOOKS.

See EVIDENCE, 2, 3.

BUILDING ACT.

- 1 In trespass against the owner of a house adjoining to the plaintiff's in the metropolis for taking down his party wall and building on it, the defendant shewing at the trial that he was authorised in doing the thing complained of under the building act 14 Geo. 3. c. 78, is entitled to treble costs under the 10th section, upon a nonsuit. *Collins v. Poney*, H. 48 G. 3. 163
- 2 Where notice of pulling down and rebuilding a party wall was given under the building act 14 G. 3. c. 78, and the tenant of the adjoining house who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house giving notice, in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same: held that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance: all the powers and authorities given by the act in respect of any works to be done, being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house. *Robinson v. Lewis*, T. 48 G. 3. 359

CARGO.

See SHIP, 4, 5.

CARRIAGES.

See TURNPIKE, 1.

CASE EXPLAINED.

- 1 *Molton v. Cheesley*.

CHARITABLE USES.

See MORTMAIN, 1.

CHARTER-PARTY.

See ASSUMPSIT, 9, 10, 11.

- 1 The clauses in the *East India* company's charter-parties, whereby the Company agree to allow 200l. per month for provisions while the ship remains in *India* or *China*, to be computed from her delivery of the Company's dispatches (if any) at the ship's "first consigned port, until she should be dispatched from her last port in *India* or *China* to return to *Europe*," is to be understood of her last consigned port; and will not include the time which elapsed after her departure from *Canton* (which was her last consigned port according to her sailing instructions,) on her return to *Europe*, from which course she was driven by stress of weather, and forced to put into *Bombay* for repairs, before she was again dispatched for *Europe*. But after the ship was ready to sail again from *Bombay*, the Company having detained her two months longer for convoy before they again dispatched her for *Europe*, they paid the 200l. a-month for that period. And the 14l. covenanted to be paid by the Company to the ship owner in *England* for each passenger ordered on board the ship in *India* by the company's agents, is payable, notwithstanding the loss of the ship before her arrival in the *Thames*. *Moffat v. The East India Company*, H 49 G. 3. 465
- 2 A covenant in a charter-party of affreightment, that the owner shall at his expence forthwith make the ship tight and strong, &c. for a voyage for twelve months, &c. and keep her so, is not a condition precedent to the recovery of freight after the freighter had taken the ship into his service and used her for a certain period; but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. *Havelock v. Geddes*, H. 49 G. 3. 508
- 3 A ship having been let to freight for 12 months, and for such longer period as the freighter should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10, and 14 months, &c.; it is no answer to a breach for non-payment of six months' freight due at the end of 10 months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped goods on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months, and that he had paid the freight for all the

time she was serviceable, and that she was not in his service for 10 months in the whole: non-constat but that, after she had been used by the freighter, she wanted repair, without any default of the owner, or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair. *Havelock v. Geddes*, H. 49 G. 3. 508

- 4 The freight, being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from 4 months to 4 months, (after the first two months) and the ship were lost before the end of 14 months. *ib.*
- 5 An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid till the ship's discharge or return from her voyage; and the ship having sailed on a voyage to *St. Domingo*, where she arrived, but was burnt before her return; held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter; on which such extra allowance became payable. *ib.*

COAL MINE.

See COPYHOLD, 1.
COVENANT, 3.

COLLEGE.

See MORTMAIN, 1.

COMPOUNDING.

See MISDEMEANOR COMPOUNDING.

CONDITION PRECEDENT.

See CHARTER-PARTY, 2, 3, 5.
FREIGHT, 2, 6.

CONSUL.

See ARREST.

CONTRACT.

See TRADE, 1.

CONVEYANCE VOLUNTARY.

A voluntary settlement of lands made in consideration of natural love and affection is void as against a subsequent purchaser for a valuable consideration, though with notice of the prior settlement before all the purchase money was paid, or the deeds executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction: for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the stat. 27 Eliz. c. 4. *Doe d. Olley v. Manning*, M. 48 G. 3. 44

CONVICTION.

Though it be proper for a magistrate in drawing up a conviction on the stat. 5 Ann.

c. 14. to state the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of such evidence, in the words of the statute, yet a conviction in the latter form is valid in law: but the magistrate subjects himself to an information if he endeavor to shelter himself from detection by mis-stating such legal result when the evidence would not warrant it. *The King v. Pearce* E. 48 G. 2. 179

- 2 The statute 42 G. 3. forbids corn making into malt to be wetted while it is a-floor before 12 days from the time when it is emptied out of the cistern. Then stat. 46 G. 3. s. 1, repeals that provision generally, and enacts (sect. 3.) that the corn in that state shall not be wetted till 9 days, &c. after the 1st of August 1806. Then, sect. 14 enacts that this act shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st of August 1806, and shall continue in force till the 25th of March 1807. Held that incorporating the 14th with the 1st sect. this law only operated as a repeal of the former one during the time limited in the 14th section; after which the first resumed its operation during the interval between the 25th of March 1807, and a subsequent act reviving and continuing the 46 G. 3. *The King v. Rogers*, H. 49 G. 3. 514

COPPER.

See MINES, 3.

COPYHOLD.

See SURRENDER.

COPYHOLD AND CUSTOMARY ESTATES.

- 1 The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing. But where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, together with the liberty of boring for and getting the coal, &c., it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse the liberty of working the mines; because the plea claims such liberty not merely as annexed to the seisin in fee to be exercised when in actual possession, but as a present liberty to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid

- it. *Bourne v. Taylor*, T. 48 G. 3. 342
- 2 One who has a prima facie title to a copyhold is entitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time. *The King v. Lucas*, T. 48 G. 3. 363
- 3 Where a copyholder of inheritance, having power by custom to cut timber, surrendered to the use of his will, and devised to A. for life, without impeachment of waste, with remainders over; though there was no instance in fact of a copyholder for life in the manor cutting timber; yet the right being annexed to the fee and inheritance, the copyholder in fee in carving out his estate may make a tenant for life dispunishable of waste; and at any rate, the lord cannot enter upon the copyholder for life's estate, as for a forfeiture, upon his cutting timber; for the injury, if any, is to the remainderman of the inheritance. *Denn d. Joddrell v. Johnson*, M. 49 G. 3. 377
- 4 Entries on the rolls of a manor court, of admission of tenants in remainder after the determination of the estate of the last tenant's widow, who held *during her chaste viduity*, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence; although there were no instances in fact stated on the rolls or known of such a forfeiture having been enforced. *Doe, dem. Askew v. Askew*, H. 49 G. 3. 492
- 5 A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of *England*, according to the custom of the manor; though the only evidence of such custom on the Rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance, by the general law of copyhold, and the title of a tenant by the curtesy being also by operation of law. *Doe d. Milner v. Brightwen*, H. 49 G. 3. 521
- 6 And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him *pursuant to the settlement*, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death. *Doe d. Milner v. Brightwen*, H. 49 G. 3. 521
- And though 1-3d of the copyhold had been settled many years before upon a third person for life; but no surrender having

been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seised and admitted; and the steward of the manor, appointed by the heir at law and her husband, had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime,) for above 20 years back, debited himself with the receipt of 2-3ds of the rent for the husband on account of his wife, and the remaining 1-3d for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-3ds, as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. 521

Nor will any release from the heir at law living at the time of such curtesy estate be presumed during that period; nor after his death from the present heir at law, who might be called upon in equity to discover it, if given; though such release, if proved or presumed, would bar the copyholder's claim. *ibid.*

CORNWALL. See MINES, 3.

CORPORATION.

- 1 The charter of *Sallash* empowers the mayor, justice of the peace, and the rest of the aldermen, (seven in all,) or the major part of them, of whom the mayor and justice to be two, when it shall seem to them convenient and necessary, to elect as many free burgesses as shall please them, and to the same free burgesses so elected to administer an oath, &c. The defendant was elected a free burgess in October 1804, and in December 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor said was held for that sole purpose, the defendant tendered himself to be sworn in: against which 3 aldermen protested, one of whom immediately left the assembly; but before the other two protestors withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant. Held,
- 1st, That the swearing in of the burgess might well be at a time subsequent to the election; he having had a present legal capacity to be sworn in at the time of his election; and therefore not like the case of an infant elected.

2dly, That the act of swearing in, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of the majority of the mayor and aldermen.

by whom such act was required to be done, whenever and howsoever assembled, and without any previous summons for this purpose; there being no dissent by the majority at the time when the oath was so administered.

8dly, Though three, an equal number of those first assembled, protested against the defendant's being sworn in when he first tendered himself to take the oath; yet one of the protestors having withdrawn, it was competent to the majority who remained to administer the oath: no vote having been come to by the major part at first assembled to preclude the body from doing the act at that meeting.

4thly, *Quære*, Whether, if it be found against a defendant in quo warranto, that, though duly elected, he was not duly sworn in, there can be any other judgment against him than of *ouster absolute*; there being no instance of a judgment of *ouster quousque*. *The King v. Courtenay*, H. 48 G. 3, 128

2 But where the new mayor of *New Romney* was required by charter to be sworn in before the old mayor, a swearing in by the town clerk, the usual officer to administer the oath, before the old mayor, but against the consent and direction of the latter, was held void. *Rex v. Ellis*, M. 8 G. 2. B. R. cited in *Rex v. Courtenay*. 131

3 The neglect to be sworn into an office for above 20 years after the party's election to it is evidence of his refusal to accept the office: as his acquiescence unexplained for so long time in the election of another person into the office is an evidence of his renunciation of it, and the acceptance of such renunciation by the body. *Rex v. Jordan, tempore Lord Hardwicke*, cited *ibid* 135

4 Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent: yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company v. Wilmot*, E. 48 G. 3. 180

5 One who has not taken the sacrament within a year, being incapable of being elected into a corporate office by stat. 13 Car. 2 c. 12. his disqualification was held not to be removed by the annual act of indemnity (47 G. 3 st. 2. c. 35.) the 6th sect. of which restrains its operation in cases where the office shall have been "already legally filled up and enjoyed by any other person," at the time of passing the act: the fact being, that the defendant and another were candidates at the time of election, when 40 electors were assembled; and after 2 electors had voted for each candidate, the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidate in the affir-

mative; whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted for the defendant, being 20 in number, except 2 or 3; and 16 afterwards voted for the other. Held,

1st, That all the votes given for the defendant after such notice were thrown away.

2dly, that the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes (not being equal in number to the good votes ultimately given for the other) had voted before such notice.

3dly, That the presumption of law being that every person has conformed to the law till something appear to rebut that presumption; it must be taken that the other candidate, who affirmed his qualification, which was not negatived by the jury, was duly qualified; and that such his election, perfected by swearing in, was *filling up and enjoying* by him of the office, with in the proviso of the indemnity act, so as to preclude its operation by relation in favor of the defendant. *The King v. Hawkins*, T. 48 G. 3. 352

CORRECTION, HOUSE OF.

See PRISONER, 1.

COSTS.

See DAMAGES AND COSTS.

1 In an order of filiation and maintenance the justices have no power by the stat. 18 Eliz. c. 3. to direct the defendant to pay the costs of the parish in obtaining the order; but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it. *The King v. Sweet*, M. 48 G. 3. 29

2 In trespass against the owner of a house adjoining to the plaintiff's is the metropolis, for taking down his party-wall and building on it, the defendant shewing at the trial that he was authorized in doing the thing complained of under the building act 14 G. 3. c. 78. is entitled to treble costs under the 10th section, upon a nonsuit. *Collins v. Poney*, H. 48 G. 3. 163

3 The costs of a suit in Chancery directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the commission; but the bankrupt remains liable to be attached for the amount under the award made a rule of court. *The King v. Davis*, H. 48 G. 3. 161

4 In a special count on a policy, the risk was stated to continue until the ship was unloaded, and there were common counts: held that the premium having been paid into court generally was an admission of the contract stated in the special count: and

- that it was not competent to the defendant to shew that the policy, by which the risk was originally made to cease after the ship was moved 24 hours in safety, was afterwards altered by the broker without the defendant's knowledge. But the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of costs; and the plaintiffs thereupon determining to take the money out of court, and not to proceed further, is entitled to all the costs of the action, and not merely to the usual costs of a new trial. *Andrews v. Palsgrave*, H. 48 G. 3. 164
- 5 Where by the rule of reference the costs were to *abide the event* of an award: that includes the costs of the reference as well as of the cause. *Wood v. O'Kelly*, E. 48 G. 3. 214
- 6 An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to his costs on the stat. 8 & 9 W. 3. c. 11. s. 2. which is confined to judgments for defendants on demurrer. *Golding v. Dias*, T. 48 G. 3. 259
- 7 Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, are liable to costs; for the fact of their possession is immaterial, and they may sue in their own right. *Hollis v. Smith*, M. 49 G. 3. 390
- 8 After verdict for the defendant, and a new trial awarded upon a question of law, without any thing said as to costs; and instead of proceeding to a second trial, the parties agree to state the facts specially, as if in a case reserved at the trial; on which the *postea* is afterwards delivered to the plaintiffs; they are entitled to the costs of the first trial. *Robertson v. Liddell*, H. 49 G. 3. 237
- 9 Debt on bond, where the plaintiff recovers a verdict for nominal damages only, and takes his judgment for the penalty, is, not within the relief of the stat. 48 G. 3. c. 46. s. 3, enabling the Court to allow the defendant costs if the plaintiff do not recover the amount of the sum for which he had held the defendant to bail. *Comrack v. Gregory*, H. 49 G. 3. 454

COVENANT.

See PLEADING, 16, 17.

- 1 A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellarbeer* field, instead of the *Allerbeer* field; being considered as part of the description of the deed declared on; though the plaintiff waived going for damages on the breach of that covenant; is fatal. *Pill v. Green*, H. 48 G. 3. 101
- 2 In a lease of ground, with liberty to make a water course and erect a mill, the lessee

covenanted for himself, his executors, &c. and assigns, not to have persons to work in the mill who were settled in other parishes, without a parish certificate; held that this covenant did not run with the land, or bind the assignee of the lessee. *The Mayor, &c. of Congleton v. Pattison*, T. 48 G. 3. 316

- 3 In covenant on an indenture of demise of a coal mine, made on the 8th of July, 1805, reserving 1-4th of the coal raised, or the value in money, at the election of the lessor; and if the 1-4th fell short of 400*l.* per annum, then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions: held that the lessor having elected to take the whole in money may declare for two years and three months' rent in arrear. But even if the money rent were reserved annually, the plaintiff may remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the 1-4th, or the value in money, &c. but had refused, &c.; held that it would not hurt general demurrer, that the count went on to allege, that before the exhibiting of the plaintiff's bill viz. on the 1st of November 1797, 500*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill 900*l.* of the rent reserved, &c. was due, is sufficient. *Buckley v. Kenyon*, T. 48 G. 3. 320

CRIM. CON.

See VENUE, 1.

CUSTOM.

See TIMBER, 1. Manor, 1.

Where a plea of justification in trespass for taking two horses, as heriots, stated a custom in the manor that the lord from time immemorial, until the division of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seized; and since the division the lord had taken and been accustomed to take on the death of every tenant dying seized of either of the moieties a heriot for each moiety; this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement before, and the other after the division of it: and being laid to be an immemorial custom, it is disproved by evidence that the division was made within memory. *Kingsmill, Bart v. Bull*, H. 48 G. 3. 100

DAMAGES AND COSTS.

In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods

under a writ of fieri facias, by which they were sold much under value, where, in stating the substance of the writ the count alleged that the sheriff was commanded to levy 80s. awarded to J. C. for his damages sustained by occasion of the detaining of the debt; that is proved by the writ which stated that the 80s. were awarded to J. C. for his damages sustained as well by reason of detaining the debt as for his costs, &c.; for costs are in legal sense included in the word damages. *Phillips v. Bacon*, H. 48 G. 3. 152

DAY-RULE.

A day rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the court on the same day; though the marshal were sued for the escape before the sitting of the court. *Field v. Jones*, M. 48 G. 3. 34

DEBTOR AND CREDITOR.

See INSURANCE OF LIFE, 1.

DEBT ON JUDGMENT.

See BANKRUPT, 8. PLEADING, 8.

DECLARATIONS—By deceased Persons.

See EVIDENCE, 2.

DEED.

See CONVEYANCE. SURRENDER, 1. OR, DESCRIPTION OF PERSONS, 1. SHIP, 5.

- 1 Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company v. Wilmot*, E. 48 G. 3. 180
- 2 A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the locus in quo under a deed of grant, by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proffered in court, of which the date and names of the parties are unknown. *Hendy v. Stephenson*, T. 48 G. 3. 383

DEMISE.

See LEASE.

DEMURRER.

See PLEADING, 20, 21.

DESCRIPTION OF PERSONS.

John Lealand surrendered a copyhold in the occupation of him *John Lealand* to the use of *Joseph Lealand* and *John Lealand* his son, for their lives and the life of the survivor; remainder to the heirs of the body of the said *John Lealand* son of *Joseph L.*;

remainder to the right heirs of the said *John Lealand*: held, that the ultimate remainder was meant for the right heirs of *John the surrenderor*; as well because *John the surrenderer* is before described with the addition of the son of *Joseph*; as of the manifest futility of giving *John the surrenderer* an estate tail, and afterwards a fee in succession. Though if the construction had been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe d. Hucknall v. Foster*, E. 48 G. 3. 200

DESERTER.

See SETTLEMENT BY HIRING AND SERVICE, 1.

DEVISE.

See MORTMAIN, 1.

- 1 One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and after their decease, in trust for all and every the child and children of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any issue, then after the decease of the survivor, in trust for her grandson, in fee, who was her heir at law: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the life-time of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; held that under the will and deeds of lease and release the three daughters took no legal estates, but that the release took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates in fee, as tenants in common. *Robinson v. Grey and Others*, M. 48 G. 3. 17
- 2 J. P. devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education, and support of his only daughter, until she should attain the age of 21 years, or marry; and when she should attain 21, or marry, then to her in fee: but in case his daughter should die under age and unmarried, then the estates to go to his wife for life; and, after her decease, to the two children of his nephew, as tenants in common in fee: with a proviso, that if either his wife or daughter should marry a Scotchman, then his wife or daughter so marrying should forfeit all benefit under his will, and the estates given to such his wife or daughter as should so marry should descend to such person or persons as would be entitled under his will, in the same manner as if his wife or daughter were dead. Held, that

such partial restraint of marriage was legal; and that the daughter having while under age married a *Scotchman* and died, leaving a son, such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the two children of the testator's nephew (which nephew was still living,) took effect immediately on such marriage; they being the persons designated by the will to take in the event which had happened; the testator having considered such prohibited marriage the same as the death of his daughter, under age, unmarried. *Perrin v. Lyon*, M. 48 G. 8.

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- 3 Where there is no connexion by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and there being no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view

Therefore, where the testator having a son married, and six grandsons and three grand-daughters, and three farms, devised all his lands to his son *for life*; and after his death gave to his eldest grandson *Thomas* (the defendant) the north side of *Down farm*, and to his grand-daughter *Frances* the south side of the same farm; and to his grandsons *George* and *Edmund*, and his grand-daughter *Elizabeth* "the upper part of *Lain farm*, equally between them so long as they should remain single; but if either married, then to have paid by the other two ten pounds a year for his or her life;" and to his grand-sons *Edward* and *John*, and his grand-daughters *Mary* and *Ann*, "the lower part of *Lain farm*, equally between them (which made them tenants in common) so long as they remained single; but if either married, then 10*l.* a-year (not saying to be paid by the others) for his or her life;" and then gave the third farm to another grandson: held, that on the marriage of *Edward*, *Mary* and *Ann*, their co-devises of the lower part of the *Lain farm*, *John*, who remained single, could not recover the 3-4ths of the farm forfeited by their marriage, as upon the supposition that the 10*l.* a year for life to each of the devises so marrying was to be paid by him who remained single; as in the corresponding devise of the other part of the *Lain farm*: but the 3-4ths may be chargeable with the annuities of 10*l.* a year to each in the hands of the heir at law, who was entitled to those shares.

Neither could the grandchildren take a fee by implication in the shares so devised to them generally, without words of limitation, merely from the circumstance

that an express estate *for life* was first given to the testator's son and heir at law. *Right d. Compton v. Compton*, H. 48 G. 8. 182

- 4 By a bequest of leasehold to *R.* until his (eldest) son *T.* shall attain 21, and no longer: but in case *T.* shall die in minority, then to *J.* or *O.* (his younger brothers) or either surviving or attaining 21, as aforesaid; with a desire that *R.* would quit and deliver up the premises as aforesaid, and confirming the bequest of them to *R.*'s family on his relinquishment of a certain claim, which he did relinquish: held, that *T.* on his attaining 21 took the estate by necessary implication; though there were a devise of the residue to *N.* the younger brother of *R.* *Goodright v. Hoskins*, H. 48 G. 8. 155

- 5 Under a devise to *A.* for life, remainder to *B.* and her heirs; but if *B.* die before *A.*, or if she die without heirs, of her body, then to *C.* and his heirs, &c.: held that the devise over to *C.* after *B.* could only take effect if *B.* died before *A.* and without issue; for that unless or were read as and the devises over would take if *B.* died before *A.*, although *B.* left issue; which would clearly be against the apparent intent of the deviser, which was to prefer the issue of *B.* to *C.* *Denn d. Wilkins v. Kemys*, E. 48 G. 8. 183

- 6 It seems that *freehold* may pass by a will giving the estate a local description and name, though it be mistakenly called *leasehold*; there being no other property answering to the name and description. *Ibid.*

- 7 Under a devise of lands to the testator's son *Joseph*, his heirs and assigns forever; but in case his son should die without issue, then, to go to the child of which his second wife was ensient; held, that *Joseph* took an estate tail. *Doe d. Ellis v. Ellis* E. 48 G. 8. 190

- 8 Under a devise of land to the two children of the testator's brother *W.*, when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage: but if either should die before 21, the survivor to be heir to the other: held that the fee passed, which would go over to the survivor in case one died under 21, and would descend or be disposable if he died after attaining 21: and that a devise of other land to the two children of another brother *R.* on the same condition as *W.*'s children, was governed by the same construction. *Doe d. Wright v. Cundall*, E. 48 G. 8. 193

- 9 One having a *freehold manor* of *Sutton*, and *freehold* lands there, and having also *copyhold* within the township of *Sutton* and within the local ambit of the manor, but held of another manor; and having surrendered his *copyhold* to the use of his will; devised all his manor of *S.*, and all his messuages, farms, lands, tene-

ments and hereditaments whatsoever, within the precincts and territories of *S.* in the county of *Chester*, with their rights, members, and appurtenances, in trust for his daughter *L.*, (having devised other estates in other counties to two other daughters,) and to her children in strict settlement: held, 1. That farms, lands, &c. within the township, though not within the manor of *Sutton*, passed by the description of farms, &c. within the precincts and territories of *S.* 2. That the general words "messuages, farms, lands, &c. and particularly the word farms, were sufficient to carry copyhold as well as freehold in the place described, if such appeared to be the intent of the testator upon the whole will." 3. That such intent was evinced in this case by the word farms, where it appeared that the testator had a farm composed of copyhold and freehold, which he had let as one entire subject, and which must otherwise be divided: and also by this, that he had charged the property devised be on the annual income of it, unless the copyhold were included. And that this intent was not rebutted by a power of leasing for 21 years given to all the tenants for life; nor by power to the trustees to raise portions by grants of long terms of years. 4. That a small copyhold distant 8 miles, and a small freehold 20 miles from *Sutton*, but within the county of *Chester*, did not pass by that devise, but did pass under a general residuary clause to another daughter. *Doe d. Belasyse v. The Earl of Lucan*, E. 48 G. 3. 219

10 *A.*, having no issue, and being tenant in tail under the will of *Dr. G.*, with remainder to *B.* and *C.* for life, remainder to the heirs of their bodies, for such estates and in such proportions as they or the survivor should appoint, and in default of such appointment, remainder to the heirs of the body of *B.*, with remainders over; made his will, whereby, after devising certain estates to trustees to sell and apply the purchase money amongst different relations, and directing them to sell all other his real estates and apply the money to some of those relations; he gave 5*l.* a-piece to *C.* (who survived *B.*) and to *D.* the only child of *B.* and *C.*, "in consideration of the ample provision made for them after my decease by *Dr. G.*, who has by his will devised to them certain estates in *R.*, now in my possession, which, though I could now legally dispose of, I mean fully to confirm to them; according to the intent of the said will." After this *A.* suffered a recovery, and declared the uses to himself for life, remainder to such persons and for such uses as he by deed, will, or codicil to be properly attested, should appoint; and for default of such appointment, to *C.* for life, remainder to *D.* for life, with remainder over in fee. After this he made a codicil, duly executed, whereby he confirmed his said will in all respects not thereby altered: and after mak-

ing some alterations in respect of other property, he declared such codicil to be part of his said will.

Held that *C.* and *D.* took nothing under the will and codicil of *A.* in the property which had belonged to *Dr. G.*: for it did not appear that *A.* intended by his will to devise the property in question, but rather to let it pass as it was devised by the will of *Dr. G.*: and his confirmation of his will by his codicil could not carry it further.

But even if he had intended to exercise a devising power by the will, according to the estates carved out by *Dr. G.*'s will for *C.* and *D.*, yet he afterwards altered that intent, and took a new estate in the premises, by suffering a recovery, the uses of which were different from those of *Dr. G.*'s will; reserving to himself a power of appointment by deed, will, or codicil; and when he executed a codicil afterwards, confirming his will in all respects, except where altered or revoked by his codicil, and then made specific alterations as to other parts of his property, without reference to his power, or to the property in question, (though such reference be not essentially necessary to the execution of a power, if it plainly appear that the party meant to execute it) nothing appeared to shew that he meant to execute the power by his codicil confirming his will generally, supposing it could take effect through the medium of such a will. *Lane v. Wilkins*, M. 49 G. 3. 369

11 One devises all his freehold estate to his wife during her natural life, "and also at her disposal afterwards to leave it to whom she pleases:" held that this only gave her a power to leave it by will; and therefore that a disposition of it by seoffment in her lifetime was void. *Doe v. Thorley*, H. 49 G. 3. 456

12 Under a devise to the testatrix's daughter *E.* for life, remainder to her children and their heirs forever; but in case *E.* die without leaving any issue of her body, then to certain other grand-children, by other daughters, equally to be divided between them, share and share alike, as tenants in common: but in case of the death of either of her grand-children, under age and without leaving any issue the share of him or her so dying should be for the benefit of the survivors of the respective family, &c. Held that the grand-children took a fee in their respective shares, by reason of the devise over on their dying under age, with an executory devise over, if any of them died under 21. and without leaving issue at the time of their respective deaths; and therefore the limitation over was not too remote. *Toovey v. Bassett*, H. 49 G. 3. 466

18 Under a devise to *H.* of certain tenements by name for her life; provided that if *S.* and *A.* (to whom and to whose children the reversion and inheritance of the premises were intended if *H.* should die with

out issue) should give *H.* 1000*l.* for her life estate, then the testator devised all and singular the said estate and premises called, &c. to *S.* and *A.* for their lives, share and share alike; and on the death of either, their moiety unto and among the children of the survivor and their heirs, share and share alike, &c. as tenants in common, &c. provided that if *H.* should die in possession of the premises single and without issue, then he gave the said estate and premises to *S.* and *A.*, and to the issue of their bodies lawfully begotten or to be begotten, and their heirs, as tenants in common as aforesaid; held that the words as aforesaid drew down to the second clause the limitations of the first, and shewed that the testator meant that *S.* and *A.* and their children should take the same estates on *H.* dying in possession without issue, as they would have done if the 1000*l.* had been paid. And held also, that a younger child of *A.* born after the death of the testator, and before the death of *H.* and *S.* (who died without issue) was entitled to share in the moieties both of *S.* and of *A.*; and that the eldest son of *A.* was also entitled to share in both moieties, though he died before *A.*; and on his death the share in *S.*'s moiety descended immediately to his next brother and heir at law, as did also his share in *A.*'s moiety, on her death after him. *Meredith v. Meredith*, H. 49 G. 3. 485

- 14 Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock; including as to six of the estates, three several lives in succession on each estate; and as to the seventh, (which in the first instance was only limited to two persons for life in succession,) giving those two a power "to add another life or lives to make three, in like manner as after mentioned for other persons to do the same;" and then giving this general power, "that when and so often as the lives on either of the estates before given shall be on death reduced to two, that then it shall be in the power of the person or persons then enjoying the said estate or estates to renew the same with the persons or persons to whom the revenue thereof shall belong, by adding a third life to such estate, and paying such reversioner two years' purchase for such renewal: and also to exchange either of the said two lives, on payment of one years' purchase;" held that the power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life. *Doe dem. Hardwicke v. Hardwicke*, H. 40 G. 3. 506

DILAPIDATIONS.

See MORTMAIN, 1.

DOGS.

See ACTION ON THE CASE, 1.

EAST-INDIA COMPANY. *See* CHARTER-PARTY, 1.

EJECTMENT.

See LANDLORD AND TENANT.

- 1 Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 Hen. 7. c. 24, it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law: but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe v. Watts*, M. 48 G. 2. 24
- 2 One having good title to the possession of a copyhold, as tenant by the curtesy, by the custom of the manor: his possession of the copyhold after his wife's death, will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death, though more than 20 years after the death of the wife. *Doe dem. Sir William Milner, Bart v. Brighton*, H. 49 G. 3. 521
- 3 And though 1-3d of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seized and admitted; and the steward of the manor appointed by the heir at law and her husband had in his accounts after the wife's death (which was evidence of his having done the same in her life time,) for above 20 years back, debited himself with the receipt of 2-8ds of the rent for the husband on account of his wife, and the remaining 1-8d for such person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-8d, distinct from his possession of the other 2-3ds as tenant by the curtesy after the wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. *Doe dem. Sir William Milner, Bart. v. Brighton*, H. 49 G. 3. 521

EMANCIPATION.

See SETTLEMENT—By Hiring and Service, 2.

EMBARGO.

See FREIGHT, 7. INSURANCE, 9.

ENEMY.

See TRADE, 1.

ENROLMENT.

See MORTMAIN, 1.

ENTRIES.

See EVIDENCE, 2, 3.

ERROR.

See COSTS, 6. INTEREST, 1.

ESCAPE.

See PRISONER, 1.

A day-rule, when made, covers by relation back the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the court on the same day; though the marshal were sued for the escape before the sitting of the court. *Field v. Jones, Marshal of K. B. Prison*, M. 48 G. 3. 34

ESTATE.

One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and, after their decease, in trust for all and every the *child and children* of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any issue, then, after the decease of the survivor, in trust for her grandson in fee, who was her heir at law: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the lifetime of the surviving daughter, to restrain the tenant from cutting timber, &c., and after a conveyance of the premises to the uses of the will; held, that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates in fee, as tenants in common. *Robinson v. Grey and Others*, M. 48 G. 3. 17

EVIDENCE.

See BANKRUPT, 2. and other particular titles.

NEWSPAPER.

In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought: and therefore a variance in that respect between the day laid and the day stated in the second, which was produced to prove the acquittal, it is not material; the day not being laid in the declaration as part of the description of such record of acquittal. *Purcell v. Macnamara*, M. 48 G. 3. 180

2 If a person have peculiar means of knowing a fact, and make a declaration of written entry of that fact, which is against his interest at the time; it is evidence of the fact as between third persons, after his death, if he could have been examined to it in his lifetime: and therefore an entry made by a man midwife in a book, of having delivered a woman of a child on a certain day referring to his ledger in which he made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery. *Higham v. Ridgway*, T. 48 G. 3. 307

3 Upon a question whether certain ancient books, from 1586 to 1693, preserved in the archives of the dean and chapter of Exeter intitled *Rentals*, and containing columns of the names of their estates, with the rents reserved on each, and *solvits* written in different hand-writing against such rents, were entries made by the receivers of the dean and chapter, charging themselves with the receipts of the rents, parol evidence cannot be received to prove them to be receivers' books, by shewing that the receivers of the dean and chapter for the last sixty years had kept their books of accounts in the same form.

But it appearing that some of the entries in such books, (though not the entries as to the rent of the estate in question) contained internal evidence of their being the books of receivers: by such entries as "*solvit mihi*;" and "*solvit per me*," signed with the initials N. W.; which entries imported that N. W. was therein accounting to the dean & chapter for money paid to himself, and with the receipt of which he debited himself; the Court directed a new trial, in order to have the inspection of the books again submitted to the Judge at nisi prius. *Doe d. Webber v. Lord George Thynne*, T. 48 G. 3. 206

4 An allegation in a declaration that one was seized of a manor of F., and that he and those whose estate he has in the *said* manor have immemorially appointed a sexton of the parish of F., is sustained by proof of his seisin of a *quondam* manor, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation. *Soane v. Ireland*, M. 49 G. 3. 373

5 Where the corporation of Worcester had for above 40 years received toll upon corn sold in their market by *sample*, and afterwards brought within the city, to be delivered to the buyer; and for about sixty years back, as far as living memory went, when corn pitched in the market-place on one market-day was not then sold, it was usually put in store in the city, and only one bag brought into the next market by way of sample, and when sold in that manner toll used to be taken on the whole; this was held sufficient evidence to be left to the jury of a prescriptive claim to take

toll on corn sold in the market *by sample*, and *afterwards* brought into the city to be delivered to the buyer; though the witnesses spoke according to their recollection and belief of the commencement of selling by sample in the market, in the manner now practiced, between 40 and 50 years ago. *Hill v. Smith*, H 49 G. 3. 473

EXECUTION.

See SHERIFF, 2.

ACTION ON THE CASE, 2.

- 1 The court will not order the sheriff to retain in satisfaction of a present writ of *fi. fa.*, issued by the plaintiff against the defendant, *money or Bank notes*, which the sheriff had before received for the use of the defendant, in discharge of an execution levied by the defendant against another, and which the sheriff had not paid over. *Knight v. Criddle*, M. 48 G. 3. 39
- 2 Kensington palace being kept in a constant state of preparation to receive the king, with his officers, servants, and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff, for the purpose of executing process against the goods of a person having the use of certain apartments therein. *Winter v. Miles*, Hil. 49 G. 3. 523

EXECUTOR.

See ADMINISTRATOR AND EXECUTOR.

FILIATION, ORDER OF.

See BASTARD. ORDER OF JUSTICES, 1.

FINE.

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 H. 7, c. 24, it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law: but by the defendant's confession of lease, entry, and oaster, the merits only of the lessor's title are put in issue. *Doe v. Watts*, M. 48 G. 3. 24

FOREIGN JUDGMENT.

The law will not raise an *assumpsit* upon a judgment obtained by default in one of the colonies against a party, who upon the face of the proceedings appeared only to have been *summoned* "by nailing up a copy of the declaration at the court-house door;" it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time of the suit commenced or afterwards: although by a law of the colony if a defendant be absent from the island, and have no attorney, manager, or overseer there, such mode of summoning him shall be deemed good service; for the absence thereby intended is of one who had been present and subject to the

jurisdiction; though even if it had been meant to reach strangers to the jurisdiction, it would not have bound them. *Buchanan v. Rucker*, H. 48 G. 3. 103

FOREIGN MINISTER.

See ARREST.

FRANCHISE.

By the long established and recognized practice of *B. R.* a writ of *capias*, with a non omittas clause, may issue in the first instance, and be executed by the sheriff, within a particular liberty, (such as the honor of *Pontefract* in the county of *York*.) the bailiff of which has the execution and return of writs, without a prior writ of *latitat* first issued, and a return made by the sheriff of *mandavi ballivo qui nullum dedit responsam*; and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was wrongfully, injuriously, and deceitfully caused to be issued by him to the damage of the bailiff's office, &c. *Carrett v. Smallpage*, E. 48 G. 3. 166

FRAUD.

The law is in all cases the judge of fraud and covin arising out of facts and intents and will infer fraud, upon the construction of the stat. 27 Eliz. c. 4, in the case of a *voluntary* settlement, made in consideration of natural love and affection, against a subsequent purchaser for a *valuable* consideration, though with notice of a prior settlement before all the purchase money was paid or the deeds executed. *Doe d. Olley v. Manning*, M. 48 G. 3. 44

FRAUDS, STATUTE OF.

A guarantee in writing to pay for any goods which the vendor delivers to a third person is good, within the 4th sect. of the statute of frauds, as containing a sufficient description of the consideration of the promise, (namely, the delivery of the goods when made,) as of the *promise* itself; both of which are included in the word *agreement*, required by that section to be reduced into writing, &c. *Stadt v. Lill*, E. 48 G. 3. 174

FREEHOLD.

See DEVISE, 6.

FREIGHT.

- 1 A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage: and each owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. *Splidt v. Bowles*, M. 49 G. 3. 285
- 2 Where the master and freighter of a ves-

- set of 400 tons mutually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed proceed to *St. Petersburg*, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, &c.: one half to be paid on right delivery, the other at 3 months: held that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery. *Ritchie v. Atkinson*, M. 49 G. 3. 331, 457
- 3 The master and the freighter of a vessel of 400 tons, having mutually agreed in writing, that the ship, being fitted for the voyage should proceed to *St. Petersburg*, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same on being paid freight, &c.: held that the master, after the taking in at *St. Petersburg*, about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted bona fide, and under a reasonable and well-grounded apprehension at the time; and a hostile seizure under an embargo was in fact made six weeks afterwards. *Atkinson v. Ritchie*, H. 49 G. 2. 391, 497
- 4 Where is a charter party freight was to be paid at so much per ton, on a right and true delivery of the homeward-bound cargo, from *Honduras Bay to London*, and the ship and cargo, after capture and recapture, having been wrecked at *St. Kitts*, into which she was carried by the captors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master, acting bona fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners; held that the freighter might recover such proceeds in assumption for money had and received, without allowing freight pro rata itineris. For such form of action, for the proceeds of an illegal sale of goods, is only a waiver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt; which admits of a set off, &c.) but does not recognize the right of the vendor to convert the goods. And here the act of conversion, (for such it must be taken to be) being made by the master, who is the general agent of the shipowners; (and not, as in *Baile v. Modigliani*, by the set of a Court of competent jurisdiction;) was unlawful, and discharged the claim of the ship owners for freight pro rata itineris. *Hunter v. Princep*, M. 49 G. 3. 428
- 5 But the plaintiff could not recover against the ship owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves. *ib.*
- 6 The 14*l.* covenanted to be paid by the East India Company in their charter-parties, to the ship owner in *England*, for each passenger ordered on board the ship in *India* by the Company's Agents, is payable, notwithstanding the loss of the ship before her arrival in the *Thames*. *Mogul v. The East India Company*, H. 49 G. 2. (And vide CHARTER-PARTY, I.) 469
- 7 Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship on freight to the defendants on a voyage from *Shields to Lisbon*, with convoy, the freight to be paid on right delivery of the cargo, the ship having sailed from *Shields* with her cargo, and joined convoy at *Portsmouth*; and after being detained near a month off *Lymington* her sailing orders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants having refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant, and then was sold by consent of both parties, without prejudice; held that the plaintiff could not recover freight pro rata, or demurrage. *Liddard v. Lopes*, H. 49 G. 3. 495
- 8 A covenant in a charter party of affreightment that the owner shall at his expence forthwith make the ship tight and strong, &c. for a voyage for 12 months, &c. and keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service, and used her for a certain period: but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owners neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. *Havelock v. Geddes*, H. 49 G. 2. 508
- 9 A ship having been let to freight for 12 months, and for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10, and 14 months, &c.; it is no answer to a breach for non-payment of six months freight, due at the end of the 10 months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped goods on board her during the 12 months, which made it necessary for him

to unload and repair her, whereby she was unserviceable for part of the six months: and that he had paid the freight for all the time she was serviceable; and that she was not in his service for 10 months in the whole; for non constat but that after she had been used by the freighter, she wanted repair, without any default of the owner; or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair. *Harelock v. Gelder*, H. 49 G. 3. 508

- 10 The freight being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from 4 months to 4 months (beginning at the end of 2 months) and the ship were lost before the end of 14 months. *id.*

GAME.

- 1 The possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not a possession within the penalty of the game laws. *Warnford v. Kendall*, T. 48 G. 3. 267
- 2 In debt for a penalty, under the game laws, if the defendant shew a deputation as gamekeeper of the manor from the lord, it may be presumed, if nothing appear to the contrary, that the game killed by him there was for the use of the lord under the stat. 3 G. 1. c. 11. *Spurrier v. Vale*, H. 49 G. 3. 444

GRANT.

See LEASE, 1.

GREENLAND FISHERY.

See IMPRESS, 1.

GUARANTIE.

See FRAUDS, STATUTE OF.
TRADE, 1.

GUARDIAN IN SOCAGE.

- A guardian in socage, residing on the Ward's estate for 40 days, gains a settlement in the parish, and cannot be removed from the possession of it at any time. *The King v. The Inhabitants of Oakley*, H. 49 G. 3. 480

HORSES.

See TURNPIKE, 1.

HOUSE OF CORRECTION.

See PRISONER.

HUSBAND AND WIFE.

- A feme covert living apart from her husband, under sentence of separation, with alimony allowed, pendente lite, in the ecclesiastical court, having brought trespass in the name of her husband against wrong doers, for breaking and entering her house and taking her goods, the court refused on

the application of such defendants to stay the action; though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs,) that the action was brought without his authority. *Chambers v. Donaldson*, E. 48 G. 3. 229

IMPRESS.

- 1 The stat. 18 G. 2. c. 28. s. 5, exempting from the impress service any harpooner, &c. or seaman in the Greenland fishery trade, is impliedly repealed by the stat. 26 G. 3. c. 41. s. 17, which exempts such harpooner, &c. whose names shall be inserted in a list, required to be delivered on oath by the owner of the vessel to the collector of the customs; and which also exempts any seaman entered on board any ship intended to proceed on the said fishery in the following season, whose name shall be inserted in a list to be delivered as aforesaid, and who shall have given security, &c. to proceed, and shall proceed accordingly; for the latter statute superadds the insertion of the seamen's names in such list as a condition precedent to the exemption. *Caruthers Ex parte*, M. 48 G. 3. 87
- 2 It does not appear that the freemen and liverymen of London are exempted from being impressed for the sea service, if in other respects fit subjects for that service. *The King v. Young*, E. 48 G. 3. 227

INDEMNITY ACT.

See CORPORATION, 9.

INDICTMENT.

No. 1, 2, 3.

- 1 One indicted for a misdemeanor may plead in abatement a misnomer of his surname, *Shakepear for Shakespeare*, which shall not be taken for idem sonans; and the plea concluding with *praying judgment of the said indictment*, and that he may not be compelled to answer the same, is good. *The King v. Shakespeare*, T. 48 G. 3. 296
- 2 One was indicted in *Middlesex* for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a prout patet by the affidavit affiled in the court of B. R. at Westminster, &c. and on this he was acquitted: after which he was indicted again in *Middlesex* for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit in which it was stated to have been sworn in London; which was traversed by an averment that in fact the defendant was so sworn in *Middlesex* and not in London: and held that he was entitled to plead autrefois acquit; for the jurat was not conclusive as to the place of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy

for the same offence. *The King v. Emden*, E. 48 G. 3. 214

- 3 Whether or not the particular schemes denounced by the stat. 6 G. 1. c. 18. s. 18. as manifestly tending to the common grievance, prejudice and inconvenience of great numbers of subjects in their trade and other affairs, be in themselves unlawful and prohibited, without reference to the fact of such tendency in a particular instance in the opinion of a court and jury; such as the raising great sums by subscription for trading purposes, and making the shares in the joint stock transferrable; at any rate, the inviting of such subscriptions by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective shares, seems to be an offence within the act. But as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator who seemed not to have been deluded by the project, but to have subscribed with a view to this application, the court refused to interfere by granting an information, though they discharged the rule without costs. *The King v. Dodd*, E. 48 G. 3. 250

INHABITANCY.

Freemen of *Norwich*, substitutes in the militia quartered at *Colchester*, but having dwelling houses in *Norwich*, in which their families resided, and to which they at times resorted on furlough, in some instances, within the last six months, only for the purpose of voting at elections, held to be *inhabitants* with in the charter of *Norwich*, and a local act, requiring them to have been *inhabitants for six calendar months* previous to certain elections of corporate officers in order to qualify them to vote. *The King v. Mitchell*, H. 49 G. 3. 488

INSOLVENT DEBTORS.

One in custody by attachment for non payment of money under 20l. found due by an award made a rule of court, is not entitled to his discharge under the stat. 49 G. 3. c. 128.; that being confined to persons in execution upon any judgment. *The King v. Hubbard*, M. 49 G. 3. 442

INSURANCE.

See PAYMENT OF MONEY INTO COURT, 1.

- 1 The stat. 48 G. 3. c. 153. s. 15. having enabled the king by order in council to licence the importation of certain goods, being *British* or neutral property, from the enemy's country, in neutral ships; a contract made by *A.* and *B.* *British* subjects, (the plaintiffs) for the purchase of brandy from a house of trade in *France* (an enemy,) to be shipped from thence in a neutral, on account of *A.* and *B.*, which contract was made in contemplation of obtaining a licence for that purpose; which licence was

accordingly obtained soon after the making of such contract, and before it was begun to be executed: is a legal contract, and may lawfully be guaranteed in the first instance by *C.* and *D.* other *British* subjects (the defendants.) And after such licence obtained, the guaranties are liable in damages for the non-shipment of the goods by the house in *France* on board a neutral sent there for that purpose. Though it were objected to the licence legalizing such trade, that it was not made out to *A.* and *B.* by name, but only to *C.* and *D.* and other *British* merchants; and that neither *C.* and *D.* nor even *A.* and *B.*, had any property in the goods; whereas the licence required the goods to be imported to be the property of the said persons or some of them; and, until shipment, the property continued in the house in *France*. For neither the act of parliament, nor the king's licence, required the owners of the property to be individually named; and even if the licence were to be so construed, as it only required the goods imported to be the property of "the said persons or some of them," as may be specified in their bills of lading; and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if so, would have conveyed to them a legal or special property in the goods; the defendants *C.* and *D.* were still liable to answer in damages, upon their guarantie, as for the non-performance of a legal contract. *Timson v. Merac*, M. 48 G. 3. 38

- 2 It is not an implied condition in a common marine policy on ship and freight, that the ship shall not trade in the course of her voyage if that may be done without deviation or delay or otherwise increasing the risk of the insurers; and therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her lading ports; and during her justifiable stay in the port so entered for that purpose she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage; it was held not to avoid the policy. *Rainne v. Bell*, H. 48 G. 2. 105

- 3 It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country; though the neutral thereby subjects his ship to be detained and carried into a *British* port for the purpose of search. And therefore a *British* underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship, whose voyage was so interrupted, either as for a total loss, if notice of abandonment

- upon the loss of the voyage be given in reasonable time; or for an average loss, if such notice be given out of time. *Barker v. Blakes*, H. 48 G. 3. 145
- 4 Where a neutral ship bound from *America* to *Havre* was so detained and brought into a *British* port; and pending proceedings in the Admiralty the king declared *Havre* in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held a total loss of the voyage, which entitled the neutral assured to abandon *ib.*
- 5 But the blockade of *Havre* having been publicly notified here on the 6th of *September*; and no notice of abandonment given till the 14th of *October*, nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any authority shewn for giving it then; held that the notice was out of time; and this, though the plaintiff's agents in this country had no notice till the 17th of *October* of the decree for the restoration of the ship and goods in question, which had been pronounced on the 8th of *October*. *ib.*
- 6 A policy of insurance originally underwritten on "ship and outfit" was after the ship sailed declared by consent of all parties, to be on "ship and goods," by a memorandum written on a blank space in the body of the policy; but without any new stamps: and it having been before decided that for want of the stamps the plaintiff could not recover as upon a policy on ship and goods, as declared by the memorandum, it was now held that he could not recover upon the policy in its original state, as an insurance on "ship and outfit" by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested. *French v. Patton*, E. 48 G. 3. 176
- 7 A ship insured from *Jamacia* to *Liverpool* was captured in the course of her voyage, and recaptured in a few days; and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment; and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors, in a port in *Ireland*, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his possession without damage and arrived at *Liverpool*, and earned her freight; the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent: held that he was not entitled to abandon; it appearing in the result that at the time when the notice of abandonment was given it was in fact only a partial and not a total loss, as the assured supposed; and there being no subsequent circumstances, such as the loss of voyage, high salvage &c. to continue it a total loss. And quære, whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss.
- The like point was ruled on the freight policy, on which there was a partial loss of 18*l.* 11*s.* 5*d.* per cent.
- But at any rate if the underwriters accept the offer of abandonment, made upon such temporary total loss, both parties are bound by it. *Bainbridge v. Neilson*, M. 49 G. 3. 405
- 8 A representation to the underwriters at the time of effecting a policy by the owner of goods on board a ship, as to the time of her sailing, being made bona fide upon probable expectation, does not conclude him. *Bowden v. Vaughan*, H. 49 G. 3. 415
- 9 A foreigner insuring in this country his ship or goods on a voyage is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government, and makes such embargo his own voluntary act. And goods having been consigned by such foreigner on his own account and risk to *British* merchants here, who in consequence of such consignment made advances to the foreigner, and made insurance upon the goods on his account, debiting him with the premiums; and the goods were afterwards abandoned in consequence of such embargo: held that as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names as interest might appear; however they might have insured their separate interests by a policy made on their own account. *Conway and Davidson v. Gray*, H. 49 G. 3. 500

INSURANCE OF LIFE.

- A creditor may insure the life of his debtor to the extent of his debt; but such a contract is substantially a contract of indemnity against the loss of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy; although the debtor died insolvent, and the executors were furnished with the means of payment by a third party. *Godsall v. Boldere*, M. 49 G. 3. 45

INTEREST.

- An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3 H. 7 c. 10, which is confined to judgments recovered by plaintiffs below, and

affirmed on a writ of error. *Golding v. Dias*, T. 48 G. 2. 259

JOINDER IN ACTION.

See PLEADING, 16, 19, 22.

JUDGMENT.

See FOREIGN JUDGMENT.

Upon a plea in abatement the court give no other than the proper judgment prayed for by the party; but upon a plea in bar, the court will give that which appears to them to be the proper judgment upon the whole record, whether regularly prayed for or not. *The King v. Shakespeare*, T. 48. G. 2. 259

JUDGMENT IN ERROR.

See COSTS, & INTEREST, 1.

JURISDICTION.

By the long established and recognized practice of B. R. a writ of capias, with a non omittas clause, may issue in the first instance, and be executed by the sheriff within a particular liberty, (such as the honor of *Pontefract* in the county of *York*.) the bailiff of which has the execution and return of writs, without a prior writ of latitat first issued, and a return made by the sheriff of mandavi ballivo qui nullam dedit responsum: and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was *wrongfully, injuriously, and deceitfully* caused to be issued by him to the damage of the bailiff's office, &c. *Carrett v. Smallpage*, E. 48 G. 3. 166

JUSTICE OF PEACE.

See ORDER OF JUSTICES.

One magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 G. 3. c. 44., though by the stat. 18 Eliz. c. 3. a. 2 jurisdiction over the subject matter is given to two magistrates. *Weller v. Toke*, E. 48 G. 3. 182

KENSINGTON PALACE.

See PALACE.

LADING, BILL OF.

See BILL OF LADING.

LANDLORD AND TENANT.

1 After a landlord has recovered in ejectment against his tenant, he may maintain debt upon the stat. 4 G. 2. c. 28. for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit. *Soulaby v. Nering* H. 48 G. 3 157.
2 A landlord of premises about to sell them gave his tenant notice to quit on the 11th of October 1806, but promised not to turn him out unless they were sold; and not

being sold till February 1807, the tenant refused on demand to deliver up possession. And on ejectment brought; held that the promise (which was performed) was no waiver of the notice, nor operated as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and therefore that the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit. *Whiteacre d. Boul v. Symonds*, T. 48 G. 3. 264

3 A landlord declared in debt, 1st, for the double value; 2dly, for use and occupation. The tenant pleaded nil debet to the first and a tender of the single rent before the action brought to the second count, and paid the money into court; which the plaintiff took out before trial and still proceeded: and held that this was no cause of nonsuit, as upon the ground of such acceptance of the single rent being a waiver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury; and that the plaintiff's going on with the action after taking the single rent out of court, was evidence to shew that he did not mean to waive his claim for the double value, but to take it pro tanto. And it seems that though the single rent were paid into court on the second count, yet if the plaintiff had not accepted it, but had recovered on the first count, the defendant would have been entitled to have the money so paid in deducted out of the larger sum recovered. *Ryall v. Rich*, T. 48 G. 3 290
4 In a lease of ground, with liberty to make a water course and erect a mill, the lessee covenanted for himself, his executors, &c. and assigns, not to have persons to work in the mill who were settled in other parishes, without a parish certificate: held that this covenant did not run with the land, or bind the assignee of the lessee. *The Mayor, &c. of Congleton v. Pattison*, T. 48 G. 3. 316

5 In covenant on an indenture of demise of a coal mine, made on the 8th of July, 1805, reserving one-fourth of the coal raised, or the value in money, at the election of the lessor; and if the one-fourth fell short of 400l. per annum, then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions: held that the lessor having elected to take the whole in money may declare for two years and three months' rent in arrear. But even if the money rent were reserved annually, the plaintiff may remit his claim as to the three months' rent and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the one-fourth or the value in money, &c. but had refused, &c. held that it would not hurt on general demurrer, that the count went on to allege,

that before the exhibition of the plaintiff's bill, viz. on the 1st of November 1797, 900*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill, 900*l.* of the rent reserved, &c. was due, is sufficient. *Buckley v. Kenyon*, T. 48 G. 3. 320

- 6 An estate, the greater part of which was in lease, either for years certain not exceeding 21, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises, or any part thereof, when he should be in the actual possession of the same, or any part thereof from time to time, by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding 21 years, or for the life or lives of any one, two, or three, person or persons: so as no greater estate than for three lives be at any one time in being in any part of the premises; and so as the ancient yearly rent, &c. be reserved." Held 1st, that the power only authorized either a chattel lease, not exceeding 21 years, or a freehold lease not exceeding three lives; and that a lease by tenant for life for 99 years determinable on lives, as it might exceed 21 years, was void at law, and was not even good pro tanto for the 21 years. *Roe d. Brune v. Prideaux*, T. 48 G. 3. 329

- 7 But the special verdict finding that the tenant in tail had received the rent reserved by such lease accruing after the death of the tenant for life who made it, and who had not given any notice to quit; held, 2dly, that the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon; and for the defect of the special verdict in this respect a venire denovo was awarded. But the Court intimated, that under the circumstances of the case, and the disparity of the rent reserved, being 4*l.* 2*s.* while the rack-rent value was 60*l.* a year; (tho' one of the lessees had been presented by the homage as tenant after the death of the tenant for life, and admitted by the lord's steward; and the 4*l.* 2*s.* reserved was more than the ancient rent;) a jury would be strongly advised to decide against a tenancy from year to year. *Roe d. Brune v. Prideaux*, T. 48 G. 3. 329

- 8 Tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessee in possession under a void lease granted by tenant for life under a power, the rack rent value of which was 80*l.* a year, cannot

maintain an ejectment, (laying his demise, at least, on a prior day,) without giving the lessee some notice to quit, so as to make him a trespasser, after such recognition of a lawful possession either in the relation of tenant, or at least as continuing by sufferance till notice. *Denn v. Rawlins*, M. 49 G. 3. 374

- 9 A lease at 48*l.* a year, granted under a power directing the best rent to be reserved, cannot be impeached merely by shewing that the lessor rejected at the time two specific offers, one of 50*l.* and another from 50*l.* to 60*l.* from other tenants; though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered; unless something extravagantly wrong in the bargain for rent be shewn. *Semb.* that the best rent means the best rack rent that can reasonably be required by a landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account. *Doe v. Radcliffe*, M. 49 G. 3. 382

- 10 A lessee of land in the *Bedford Level* cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 Car. 2. c. 17, for want of being registered; such act enacting, that "no lease, &c. should be of force but from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrances, registering their titles before. *Hodson v. Sharpe*, M. 49 G. 3. 295

- 11 Under a power to demise for 21 years in possession, and not in reversion, a lease dated in fact on the 17th of February 1802, habendum from the 25th of March next ensuing the date thereof, is good, if not executed and delivered till after the 25th of March; for it then takes effect as a lease in possession, with reference back to the date actually expressed. *Doe v. Day*, H. 49 G. 3. 441

LEASE.

See LANDLORD AND TENANT.

POWER, 1, 2, 3, 5.

- Under a lease for 14 or 7 years the lessee only has the option of determining it at the end of the first 7 years; every doubtful grant being construed in favour of the grantee. *Doe v. Dixon*, M. 48 G. 3. 23.

LIBEL.

- An affidavit made and signed by the printer and publisher and proprietor of a newspaper, as required by stat. 33 G. 3. c. 78, which affidavit contained the names of the

parties, the place where the paper was printed, and the title of it; together with the production of a newspaper, tallying in every respect with the description of it in the affidavit; is not only evidence by that act of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be: and this, upon the trial of an information for a libel contained in such newspaper. *The King v. Hurt and White*, T. 48 G. 3. 300

LICENCE TO TRADE WITH ENEMY.

See TRADE, 1.

LIEN.

The master of a ship has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage. *Hussey v. Christie*, E. 48 G. 3. 210

LIFE INSURANCE.

See INSURANCE OF LIFE.

LONDON DOCK COMPANY.

By the construction of the statute 39 and 40 G. 3. c. 47, the London Dock Company are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their warehouses and other works, which are finished and productive, though all the works directed by the act be not completed. But such completed works must under such circumstances be rated for their value at the rate of 8 l. 2d. in the pound; such being the rate calculated upon by the legislature to raise 139l. 8s. 7d. per quarter upon 3966l. the average rental for 10 years preceding the statute, on the premises destroyed by the company in making their works; and which quarterly sum the Company were at all events bound to pay to the parish during the 12 years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus is to be taken in the first instance by the Company; in order to reimburse themselves what they may have advanced to the parish, to make good the deficiencies, before any such productive surplus existed, until the Company shall be reimbursed. Therefore, until these purposes are effected, a rate made on the increased real value of the Dock premises at more than 8 l. 2d. in the pound on the old average value of the premises before the erection of the company's works, and below the increased value of the new works, is, in either case, bad *The King v. The Inhabitants of St. George, Middlesex*, M. 48 G. 3. 74

LONDON.

It does not appear that the freemen and liverymen of London are exempted from being impressed for the sea service, if in other respects fit subjects for that service. *The King v. Young*, E. 48 G. 3. 227

MALICIOUS PROSECUTION.

1 In an action on the case for a malicious

prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought; and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the description of such record of acquittal. *Purcell v. Macnamara*, M. 48 G. 3. 180

2 It lies on the plaintiff in an action for a malicious prosecution to give evidence of malice in the defendant, either express, or to be collected from circumstances shewing plainly the want of probable cause; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called. *Purcell v. Macnamara*, E. 48 G. 3. 180

MANDAMUS.

See APPEAL, 1. COPYHOLD, 2.

See CORPORATION, 1. SEWERS, 1.

MALT

See CONVICTION.

MANOR.

- 1 An allegation in a declaration that one was seised of a manor of F., and that he and all those whose estates he has in the said manor have immemorially appointed a sexton of the parish of F., is sustained by proof of his being seised of a *quondam* manor, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation. *Soane v. Ireland*, M. 49 G. 3. 373
- 2 Though the lord of a manor in Cornwall may by conveyance and acts of ownership establish his right to all his mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet consistently therewith the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than twenty years past establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands within the vill. *Curtis v. Daniel*, M. 49 G. 3. 380

MARRIAGE.

- 1 A wagering contract for fifty guineas, that the plaintiff would not marry within six years, is *prima facie* in restraint of marriage, and therefore void: no circumstances appearing to shew that such restraint was prudent and proper in the particular instance. *Hartley v. Rice*, T. 48 G. 3. 300
- 2 Evidence that British subjects in a foreign country, being desirous of inter-marrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating clerk; which service the parties understood to be the marriage service of the

church of *England*; and they received a certificate of the marriage, which was afterwards lost; is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years cohabitation as man and wife, till the period of the husband's death.

And such *British* subjects being attached at the time to the British army on service in such foreign country, and having military possession of the place; it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of *England*, as a marriage contract per verba de presenti before the marriage act: marriages beyond sea being excepted out of that act; and it would make no difference if solemnized by a Roman Catholic priest. *The King v. The Inhabitants of Brampton*, M. 49 G. 3. 384

MARRIAGE, RESTRAINT OF.

J. P. devised real and personal estate to trustees to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education, and support of his only daughter until she should attain the age of 21 years, or marry; and when she should attain 21, or marry, then to her in fee: but in case his daughter should die under age and unmarried, then the estates to go to his wife for life; and, after her decease, to the two children of his nephew, as tenants in common in fee: with a proviso, that if either his wife or daughter should marry a *Scotchman*, then his wife or daughter, so marrying, should forfeit all benefit under his will, and the estates given to such his wife or daughter as should so marry should descend to such person or persons as should be entitled under his will in the same manner as if his wife or daughter were dead. Held, that such partial restraint of marriage was legal; and that the daughter having while under age married a *Scotchman* and died, leaving a son, such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the two children of the testator's nephew (which nephew was still living) took effect immediately on such marriage: they being the persons designated by the will to take in the event which had happened: the testator having considered such prohibited marriage the same as the death of his daughter, under age, unmarried. *Perrin v. Lyon*, M. 48 G. 3. 93

MARKET TOLL.

Where the corporation of *Worcester* had for above forty years received toll upon corn sold in their market by sample, and afterwards brought within the city to be delivered to the buyer; and for about sixty years back, as far as living memory went, when

corn pitched in the market place on one market day was not then sold, it was usually put in store in the city, and only one bag brought into the next market by way of sample, and when sold in that manner toll used to be taken on the whole; this was held sufficient evidence to be left to the jury of a prescriptive claim to take toll on corn sold in the market by sample, and afterwards brought into the city to be delivered to the buyer; though the witnesses spoke according to their recollection and belief of the commencement of selling by sample in the market, in the manner now practiced, between forty and fifty years ago. *Hill v. Smith*, H. 49 G. 3. 473

MASTER AND SERVANT.

See SETTLEMENT BY HIRING AND SERVICE.

MILITIA.

A captain in the militia receiving his pay and contingent allowances, before his qualification was properly authenticated, is not executing any power directed by the militia act of the 42 G. 3. c. 90, to be executed by captains, so as to bring him within the penalty of the 14th clause; the receipt of such pay and allowances not being provided for by that statute, even if any other than acts military discipline were intended to be so prohibited. *Robinson v. Garthwaite*, H. 48 G. 3. 161

MINES.

See COVENANT, 8.

- 1 The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within the manor, under which there are mines and veins of coal, in order to bore for and work the same; and the copyholder may maintain trespass against him for so doing. *Bourne v. Taylor*, T. 48 G. 3. 842
- 2 But where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, together with the liberty of boring for and getting the coal, &c. it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse the liberty of working the mines; because the plea claims such liberty not merely as annexed to the seisin in fee, to be exercised when in actual possession, but as a present liberty, to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it. *Bourne v. Taylor*, T. 49 G. 3. 842
- 3 Though the lord of a manor in *Cornwall* may by conveyance and acts of ownership.

establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet consistently therewith the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than twenty years past establish their right to the copper mines, as well under the waste and customary lands, as under the freehold lands within the vill. *Curtis v. Daniel*, M. 49 G. 8. 380

MISDEMEANOR.—Compounding.

See INDICTMENT.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish; in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor; may at any rate countermand the application of the money before it is so applied; and may recover it back in an action for money had and received. *Taylor v. Lendey*, M. 48 G. 2. 39

MONEY.

See EXECUTION, 1.

MORTMAIN.

Where successive rectors had been in possession of land for above fifty years past; but in an action for dilapidations brought by the present against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 G. 2, c. 36, and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c. according to the 4th section; held that no presumption could be made of any such conveyance enrolled, (which, if it existed, the party might have shewn,) and consequently that the rector had no title to the land, as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed; although in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in *Baliol college, Oxford. Wright v. Smythies*, H. 49 G. 3. 448

NEUTRAL TRADE.

See INSURANCE, 3.

NEWSPAPER EVIDENCE OF PUBLICATION.

An affidavit made and signed by the printer and publisher and proprietor of a newspaper as required by stat. 38 G. 3. c. 78, which affidavit contained the names of the parties, the place where the paper was printed, and the title of it; together with the production of a newspaper, tallying in every respect

with the description of it in the affidavit; is not only evidence by that act of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be; and this upon the trial of an information for a libel contained in such newspaper. *The King v. Hart and White*, T. 48 G. 3. 300

NEW TRIAL.

The Court will not grant a new trial in a penal action where the verdict has passed for the defendant, on the ground of its being against the evidence. *Brook qui tam v. Middleton*, M. 49 G. 3. 378

NONSUIT.

See PLEADING, 20, or PRACTICE, 31.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 2, 7, 8.

NUISANCE.

See INDICTMENT, 2.

OCCUPATION.

See POOR'S RATE, 2.

ORDER OF JUSTICES.

In an order of filiation and maintenance the justices have no power by the stat. 18 Eliz. c. 3. to direct the defendant to pay the costs of the parish in obtaining the order; but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it. *The King v. Sweet*, M. 48 G. 3. 29

OUSTER, JUDGMENT OF.

See QUO WARRANTO, 1.

PALACE.

Kensington palace being kept in a constant state of preparation to receive the king, with his officers, servants and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff, for the purpose of executing process against the goods of a person having the use of certain apartments therein. *Winter v. Miles*, H. 49 G. 3. 523

PARISHIONER.

See WITNESS, 1, 2.

PARTNERS.

See BANKRUPT, 4.

1 The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by

the partner signing such security that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. *Lord Viscount Galloway v. Mathew and another*, M. 49 G. 3. 373

- 2 Two of three partners, affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners, having in the mean time committed acts of bankruptcy, indorsed such bill to the creditor of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners who were declared bankrupts, and their effects assigned; the other partner being all the time abroad. Held, 1st, that by such indorsement of the bill by the two after acts of bankruptcy committed by them, though before the commissions issued, nothing passed to the creditor; for the bankrupt partners had by relation ceased at the time of such indorsement to have any controul over the joint stock as partners, and therefore could not bind either the property of the assignees or of their solvent partner. 2dly, That the solvent partner might join with the assignees of the other two in maintaining an action for money had and received, to recover back from the creditor the amount of the bill received by him from the acceptor. 3dly, that such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs. *Thomason jointly with Hipgip and Others assignees of Underhill and Guest, v. Frere*, H. 49 G. 3. 447

PARTY WALL.

See BUILDING ACT.

PAYMENT OF MONEY INTO COURT.

See LANDLORD AND TENANT, 2, 3.

- In a special count on a policy of insurance, the risk was stated to continue until the ship was unloaded, and there were common counts; held that the premium having been paid into court generally was an admission of the contract stated in the special count, and that it was not competent to the defendant to shew that the policy, by which the risk was originally made to cease after the ship was moored 24 hours in safety, was afterwards altered by the broker without the defendant's knowledge. *Andrews v. Palgrave*, H. 48 G. 3. 164

PENAL ACTION.

- 1 Though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened within the proper county where the venue is laid. *Robinson v. Garthwaite*, H. 48 G. 3. 151
- 2 The Court will not grant a new trial in a penal action where the verdict has passed for the defendant, on the ground of its being against the evidence. *Brook qui tam v. Middleton*, M. 49 G. 3. 378

PLEADING.

See JUDGMENT.

See MALICIOUS PROSECUTION, 1.

- 1 Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to support it, is not necessary to sustain an action of slander, it may be rejected as surplage. And therefore an innuendo, that the *Attorney-General* spoken of meant the *Attorney-General* for the county palatine of *Chester*, was so rejected. *Roberts v. Camden*, M. 48 G. 3. 59

Vid. SLANDER, 1.

- 2 Where a plea of justification in trespass for taking two horses as heriots, stated a custom in the manor that the lord from time immemorial, until the division of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seised; and since the division the lord had been accustomed to take on the death of every tenant dying seised of either of the moieties a heriot for each moiety: this must be taken to be one entire custom, and not two distinct customs; the one applicable to the tenement before, and the other after the division of it: and being laid to be an immemorial custom, it is disproved by evidence that the division was made within memory. *Kingsmill, Bart. v. Bull*, H. 48 G. 3. 100
- 3 To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been taken up, borrowed and received by the defendants of the plaintiffs at respondentia interest, secured by a cargo of goods shipped from *Calcutta* to *Ostend*, it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the *East Indies*, and illegally prepared by the plaintiffs for shipment from thence to beyond the *Cape of Good Hope*, without the licence of the *East India Company*; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money taken up, borrowed, and received, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond: but if it

- were inconsistent with it, the plea would still be good in this form. *Paxton v. Popham*, E. 48 G. 3. 201
- 4 An officer cannot commute for money the services of an impressed man, nor let him go for money; and a bond given to secure the man's return on non-payment of such money is void, and may be avoided by plea disclosing the true transaction, and shewing that the man was illegally impressed. *Pole v. Harrobin*, E. 22 G. 2 B. R. 205
- 5 An attorney of B. R. in pleading his privilege against being sued by original, improperly stated the custom of this court to be not to compel its attorneys to answer an original writ, *unless first forejudged from their office*, &c. (which is the custom in C. B. but not in this court); but held that enough appearing to sustain the plea, the custom which had no foundation here, (of which the court would take notice) might be rejected as surplussage. *Stokes v. Mason*, E. 48 G. 3. 208
- 6 The stat. 32 G. 3. c. 58. s. 1. enabling defendants in quo warranto to plead double, is, as well as the stat. 9 Ann. c. 20., confined to corporate officers. *The King v. Richardson*, E. 48 G. 3. 228
- 7 A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the locus in quo under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not preferred in Court, of which the date and names of the parties are unknown. *Handy v. Stevenson*, T. 48 G. 3. 233
- 8 A new assignee of a bankrupt, suing in debt on a judgment recovered by a former assignee displaced by the Lord Chancellor, may declare in a general form as having been duly constituted and appointed assignee. *De Cosson v. Vaughan*, in error, T. 48 G. 3. 233
- 9 Where the plaintiff complains of a single act of trespass in each count, each of which is justified by the defendant in his several pleas, the plaintiff cannot in his replication take issue upon the facts of such justification, and also newly assign either the same or different matters; such replication and new assignment being doable. *Cheasley v. Barnes and others*, T. 48 G. 3. 291
- 10 And the objection is sufficiently pointed at by assigning as special cause of demurrer, that each plea containing a distinct justification to the single act of trespass alleged in breaking and entering the plaintiff's close in the first count, &c. the plaintiff had by his replications and new assignment attempted to put in issue several distinct acts of trespass in breaking and entering the same close, &c. *ib.*
- 11 A sheriff justifying in trespass under a writ of fieri facias, need not shew its return; the distinction being in this respect between a justification under meane process, and under process in execution; at least, where in the latter case no ulterior process is necessary to complete the justification. *ib.*
- 12 One indicted for a misdemeanor may plead in abatement a misnomer of his surname *Shakepear* for *Shakespeare*; which shall not be taken for idem sonans; and the plea concluding with *praying judgment of the said indictment, and that he may not be compelled to answer the same*, is good. *Rez v. Shakespeare*, T. 48 G. 3. 295
- 13 In covenant on an indenture of demise of a coal mine, made on the 8th of July 1806, reserving 1-4th of the coal raised, or the value in money, at the election of the lessor: and if the 1-4th fell short of 400l. per annum, then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions: held that the lessor having elected to take the whole in money may declare for two years and three months' rent in arrear. But even if the money rent were reserved annually, the plaintiff may remit his claim as to the three months rent, and enter up judgment for the two years rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the 1-4th, or the value in money, &c. but had refused, &c.; held that it would not hurt on general demurrer, that the count went on to allege, that before the exhibiting of the plaintiff's bill, viz. on the 1st of November, 1797, 900l. of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill 900l. of the rent reserved, &c. was due, is sufficient. *Buckley v. Kenyon*, T. 48 G. 3. 320
- 14 Where a defendant in trespass for breaking and entering a copyhold close, justified under the lord, as being seized in fee of the veins of coal lying under the copyhold tenements, together with the liberty of boring for and getting the coal, &c. it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse the liberty of working the mines; because the plea claims such liberty not merely as annexed to the seisin in fee, to be exercised in actual possession, but as a present liberty, to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it. *Bourne v. Taylor*, T. 48 G. 3. 342
- 15 Where a sham plea was pleaded of judgments recovered in the court of Pie-poudre in *Bartholomew fair*, in terms palpably

- fictitious and out of the regular course, the Court reprobated the practice, and suffered the plaintiff, to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. *Blewitt v. Marsden*, T. 48 G. 8. 363
- 16 To a count in covenant, charging the defendants as executors for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors and assigns, may be joined another count, charging them that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one D. A. against whom breaches were alleged; and concluding that so neither the testator, nor the defendants after his death, nor D. A. since the assignment to him, had kept the said covenant, but had broken the same. And plene administraverunt may be pleaded to both counts. *Wilson v. Wigg*, M. 49 G. 3. 393
- 17 It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead plene administravit of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading plene administravit by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund out of which any devastavit by the first executor could be made good. *Wells v. Fyde*, M. 49 G. 3. 399
- 18 A plea of tender to one count, and a plea of alien enemy to another, cannot be pleaded together. *Shomebeck v. De La Cour*, M. 49 G. 3. 404
- 19 After a writ sued out, and common bill filed, against a defendant by the name of J., it is irregular for the plaintiff to declare against him by the name of R. sued by the name of J. (he not having then appeared) and the defendant may set aside the proceedings before plea. *Delanoy v. Cannon*, M. 49 G. 3. 405
- 20 Where a request to the defendant to do an act is necessary to be alleged in order to give the plaintiff his cause of action; and it is alleged, but without a particular venue, (there being a general venue laid in the preceding part of the declaration;) such omission cannot be taken advantage of in arrest of judgment since the stat. 4 Ann. c. 16. s. 1, being mere matter of form, available only upon special demurrer; and this, though judgment passed by default, on which a writ of inquiry was executed. And where, in consideration of the purchase of hay by the plaintiff of the defendant, the latter promised to deliver to and suffer the plaintiff to take it away as he wanted it, when requested; an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of the residue to other persons, supercedes the necessity of alleging a request to deliver, &c. the residue. *Bowdell v. Parsons*, M. 49 G. 3. 419
- 21 After judgment for the defendant on demurrers to certain special pleas there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined. *Paxton v. Popham*, M. 49 G. 3. 291
- 22 A solvent partner may join with the assignees of his two bankrupt partners in maintaining an action for money had and received to recover back from a creditor the amount of a bill, the joint property of the firm received by him from the acceptor by the indorsement of the two other partners after acts of bankruptcy committed by them. *Thomason, jointly with Hippi and others, assignees of Underhill and Guest v. Frere*, H. 49 G. 3. 447

POOR APPEAL.
Set APPEAL.

POOR-RATE.

- 1 By the construction of the statute 39 and 40 G. 3. c. 47, the *London Dock Company* are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their warehouses and other works which are finished and productive, though all the works directed by the act be not completed. But such completed works must under such circumstances be rated for their value at the rate of 8 1-2d. in the pound; such being the rate calculated upon by the legislature to raise 139l. 8s. 7d. per quarter upon 3966l. the average rental for 10 years preceding the statute, on the premises destroyed by the company in making their works; and which quarterly sum the Company were at all events bound to pay to the parish during the 12 years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus is to be taken in the first instance by the Company; in order to reimburse themselves what they may have advanced to the parish, to make good the deficiencies, before any such productive surplus existed, until the Company shall be reimbursed. Therefore until these purposes are effected, a rate made on the increased real value of the Dock premises at more than 8 1-2d. in the pound, or a rate of 8 1-2d. in the pound on the old average value of the premises before the erection of the Company's works, and below the increased value of the new works, is in either case bad. *The King v. The Inhabitants of St. George, Middlesex*, M. 48 G. 3. 74
- 2 Payment by one who was assessed to a church rate upon householders only, and not upon the parishioners at large, will nevertheless gain him a settlement; for it is not less a public tax, because laid too narrowly; and it is charged and paid within the parish, which is all that is required by the stat. 3 W. c. 11. s. 6. *The King v. The Inhabitants of St. Bass*, H. 48 G. 3. 119

POOR'S RATE.

- 1 *Saleable underwoods* are rateable annually to the relief of the poor, within the construction of the st. 43 Eliz. c. 2. in proportion to their value, though they should happen not to be cut down more than once in 21 years; and their annual value may be estimated amongst other ways according to the value they may be worth to rent for a lease of the duration of their intended growth. *The King v. The Inhabitants of Myrfield*, T. 48 G. 3. 417
- 2 One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual, is liable to be rated to the relief of the poor as occupier of the whole house. *The King v. The Inhabitants of Aberystwith*, M. 49 G. 3. 417
- 3 Beech being admitted to be timber by the custom of the county of Bucks, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at 20 years growth; and therefore upon an issue, whether certain beech trees in that county, (which after being felled had been distrained for payment of a poor's rate, to which it was contended that they were liable,) were or were not *timber*, according to the custom of the county, the inquiry is confined to the nature of the wood, and the period of its growth, whether of 20 years; and no evidence can be received to qualify its character of *timber*, by shewing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood. And the jury having found a general verdict for the plaintiff on that issue, affirming such trees of 20 years growth and upwards, though not containing ten feet of solid wood, to be *timber* by the custom; and also upon another issue, negating them to be *saleable underwood* within the stat. 43 Eliz. c. 2.; the Court refused to grant a new trial. *Aubrey v. Fisher*, H. 49 G. 3. 460

POOR-REMOVAL.

See SETTLEMENT.

- 1 By the stat. 35 G. 3. c. 101 s. 2 the party aggrieved by an order of Justices, directing payment, to the amount of above 20l. of the charges and costs of the suspension of an order of removal, on account of the illness of the pauper, may appeal to the next sessions, in like manner as against an order of removal, though he omit to give notice of such his appeal within three days after the demand of such charges and costs; by which he makes himself liable to a distress for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the surplus, if before levied by distress, must be refunded.

The King v. The Inhabitants of Bradford, M. 48 G. 3. 61

- 2 Under the stat. 35 G. 3. c. 101. s. 2. an order of justices, suspending their order made for the removal of a pauper to his place of settlement, on account of sickness, may be made, though he were not *brought before the justices*, at the time of such orders made: the plain intent and precise object of the statute being to extend the power of suspension to all cases where orders of removal may be made: and orders of removal may be made though the paupers to be removed be not brought personally before the magistrates; however fit that is to be done where it may be done. *The King v. The Inhabitants of Everdon*, M. 48 G. 3. 63
 - 3 A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, is removeable as an unmarried woman under sect. 6 of stat. 35 G. 3. c. 101.; and the presumption of her being chargeable arises by the same clause from the bare fact of being with child of a bastard, if no circumstances be stated to shew that such presumption is not applicable to a person in the particular situation of the party coming within the general description of the clause. And the order of removal may charge such a person generally as *actually chargeable* without setting forth in what manner chargeable. *The King v. The Inhabitants of Tibbenthams*, E. 48 G. 3. 192
 - 4 An order of removal founded on the stat. 35 G. 3. c. 101. s. 6 stating that *A E. single woman* was "by being pregnant" *deemed to have become chargeable*," &c. is good. *The King v. The Inhabitants of Diddlebury*, E. 48 G. 3. 197
 - 5 A labourer employed by his master to drive a cart into his parish with one load, and to return with another, and who broke his leg there by accident, which detained him for some time in such parish, by which he was relieved, is to be considered as *casual poor*, and, as such, is not removeable either under the stat. 13 & 14 Car. 2. c. 12. or the stat. 35 G. 3. c. 101, as not coming there to *settle or inhabit*; and consequently the expences of his relief cannot be directed to be paid during the suspension of the order of removal under the latter statute. *Rez v. The Inhabitants of St. James's in Bury, St. Edmunds*, T. 48 G. 3. 269
- The same point was ruled in *The King v. The Inhabitants of Thatcham*, M. 49 G. 3. in a case nearly alike in circumstances.

POSSESSION.

- 1 Where successive rectors had been in possession of land for above fifty years past; but in an action for dilapidations brought by the present against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 G. 2. c. 36, and

- that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c. according to the 4th section: held that no presumption could be made of any such conveyance enrolled, (which if it existed the party might have shewn,) and consequently that the rector had no title to the land; as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed; although in fact it appeared that one of these devisees was the then rector, and that the title to the rectory was in *Balliol college, Oxford. Wright v. Smythies*, H. 49 G. 3. 443
- 2 One having good title to the possession of a copyhold as tenant by the curtesy, his possession of the copyhold after his wife's death, will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir at law of the wife in descent brought within 20 years after the husband's death. *Doe dem. Sir William Milner, Bart. v. Brightwen*, H. 49 G. 3. 521
- 3 And though 1-3d of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seized and admitted: and the steward of the manor appointed by the heir at law and her husband had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime,) for above 20 years back, debited himself with the receipt of 2-3ds of the rent for the husband on account of his wife, and the remaining one-third for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-thirds as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. *Doe dem. Sir William Milner, Bart. v. Brightwen*, H. 49 G. 3. 521

POWER.

See LANDLORD AND TENANT.

- 1 An estate the greater part of which was in lease, either for years certain not exceeding 21, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises or any part

"thereof, when he should be in the actual possession of the same, or any part thereof, from time to time, by indenture to make leases of all or any part or parts of the demesne lands whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding 21 years, or for the life or lives of any one, two, or three person or persons: so as no greater estate than for three lives be at any one time in being in any part of the premises; and so as the ancient yearly rent, &c. be reserved." Held 1st, that the power only authorized either a chattel lease, not exceeding 21 years, or a freehold lease not exceeding three lives; and that a lease by tenant for life for 99 years determinable on lives, as it might exceed 21 years, was void at law, and was not even good pro tanto for the 21 years. *Roe d. Brunt v. Prideaux*, T. 48 G. 3. 329

- 2 A lease at 43l. a year was granted under a power directing the best rent to be reserved; cannot be impeached merely by shewing that the lessor rejected two specific offers, one of 50l. and another from 50l. to 60l. from other tenants; though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered: unless something extravagantly wrong in the bargain for rent be shewn. Semble, that the best rent means the best rackrent that can reasonably be required by a landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account. *Doe v. Radcliffe*, M. 49 G. 2. 382
- 3 Under a power of demise for 21 years in possession and not in reversion, a lease dated in fact on the 17th of February 1802, habendum from the 25th of March next ensuing the date thereof, is good, if not excepted and delivered till after the 25th of March; for it then takes effect as a lease in possession, with reference back to the date actually expressed. *Doe v. Day*, H. 49 G. 3. 441
- 4 One devises all his freehold estate to his wife during her natural life, "and also at her disposal afterwards to leave it to whom she pleases:" held that this only gave her a power to leave it by will; and therefore that a disposition of it by feoffment in her lifetime was void. *Doe v. Thorley*, H. 49 G. 3. 456
- 5 Under a devise of seven different estates to a sister, brothers, and nephews respectively, one to each stock, including, as to six of the estates, three several lives in succession on each estate, and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power "to add another life or lives to

make 8, in like manner, as after mentioned, for other persons to do the same;" and then giving this general power, "that *when* "and so often as the lives on either of the "estates before given shall be by death reduced to two, that then it shall be in the "power of the person or persons then enjoying the said estate or estates to renew "the same with the person or persons "to whom the revenue thereof shall be "long, by adding a third life to such estate, and paying such reversioner two "years' purchase for such renewal; and "also to exchange either of the said two "lives, on payment of one year's purchase;" held that this power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life. *Doe dem Hardwicke v. Hardwicke*, H. 48 G. 3. 506

PRACTICE.

- 1 The court will not order the sheriff to retain, in satisfaction of a present writ of *f. fa.* issued by the plaintiff against the defendant, money or bank notes, which the sheriff had before received for the use of the defendant, in discharge of an execution levied by the defendant against another, and which the sheriff had not paid over. *Knight v. Criddle*, M. 48 G. 3. 39
- 2 A day-rule, when made, covers by relation back the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the court on the same day: though the marshal were sued for the escape before the sitting of the court. *Field v. Jones, Marshal of K. B. Prison*, M. 48 G. 3. 84
- 3 A prisoner under criminal process in the house of correction cannot be brought up by habeas corpus ad respondendum, for the purpose of being charged with a declaration on a bailable writ, and re-committed to his former custody so charged; for the court have no power to make a gaoler of such prison liable for the escape of a prisoner on civil process. *Brandon v. Davis*, M. 48 G. 3. 86
- Aliter in the case of a sheriff or gaoler of the court. *ibid.*
- 4 Order to amend writs of *scire facias* on a judgment, and declaration thereon, conformably to the judgment roll. *Braswell v. Jeco*, H. 48 G. 3. 160
- 5 The sheriff cannot relieve himself from an attachment for not bringing in the body, by payment of the debt sworn to and indorsed on the bailable writ since the stat. 43 G. 3, c. 46. s. 2, having neglected to take the money at the time of the arrest as directed by that act: but must pay the whole debt and costs. *The King v. The Sheriff of London*, H. 48 G. 3. 160
- 6 The court would not stay judgment and execution, on a summary application, because the plaintiffs after verdict became alien enemies. *Vandrynen v. Wilson*, H. 48 G. 3. 162

7 None can be held to special bail in trover or detinue, without a judge's order. *Reg. Gen. H.* 48 G. 3. 164

8 By the long established and recognized practice of *B. R.* a writ of *cepias*, with a non omittas clause, may issue in the first instance, and be executed by the sheriff within a particular liberty, (such as the honor of *Pontefract* in the county of *York*;) the bailiff of which has the execution and return of writs, without a prior writ of *latitat* first issued, and a return made by the sheriff of *mandavi ballivo qui nullum dedit responsum*: and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was *wrongfully, injuriously and deceitfully* caused to be issued by him, to the damage of the bailiff's office, &c. *Corbett v. Snaithpage*, E. 48 G. 3. 166

9 Bail above having been put in, and exception entered in the vacation, notice of justification for the first day of the next term must be given within four days after such exception. *Millson v. King*, E. 48 G. 3. 213

10 Where the rule for an attachment against the sheriff for not bringing in the body was obtained on the 11th of *February*, which attachment was returnable on the 4th of *May*, and the plaintiff did not issue the attachment till the 3d of *May*, and in the mean time the defendant became bankrupt on the 10th *March*, by which means the sheriff lost his opportunity of paying the debt and proving it under the commission; the attachment was set aside for such laches. *The King v. The Sheriff of Surrey*, E. 48 G. 3. 322

11 The statute 32 G. 3 c. 58. s. 1, enabling defendants in quo warranto to plead double is, as well as the stat. 9 Ann. c. 20, confined to corporate officers. *The King v. Richardson*, E. 48 G. 3. 228

12 A *soine covert* living apart from her husband, under sentence of separation, with alimony allowed, pendente lite, in the ecclesiastical court, having brought trespass in the name of her husband against wrong doers for breaking and entering her house and taking her goods, the Court refused on the application of such defendants to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs,) that the action was brought without his authority. *Chambers v. Donaldson*, E. 48 G. 3. 229

13 The English notice required by the stat. 5 G. 2. c. 27. s. 4. is to be on the copy of the process, and not on the writ itself: and the service of such copy without the notice is irregular and will be set aside; though the court discharged a rule for quashing the writ itself on this account. *Lloyd v. Maurice*, E. 48 G. 3. 255

14 No cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule

- For such special jury be served, and the caused marked in the marshal's book as a special jury, on or before the day preceding the adjournment day in *Middlesex* and *London* respectively. *Regula Generalis*, H. 44 G. 3. 173
- 15 An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3 H. 7. c. 10, which is confined to judgments recovered by plaintiffs below, and affirmed on a writ of error. Neither is such defendant in error entitled to his costs on the statute 8 & 9 W. 3. c. 11. s. 2. which is confined to judgments for defendants on demurrer. *Golding v. Dias*, T. 48 G. 3. 259
- 16 The venue may be changed in an action for criminal conversation on the usual affidavit, that the whole cause of action, if any, arose in the county to which it is changed; for the whole cause of action is the trespass on the plaintiff's wife; and the venue can only be brought back by the plaintiff's undertaking to give material evidence in the original county. *Guard v. Hodge*, T. 48 G. 3. 272
- 17 In the case of a defendant charged in execution, the committitur must be filed of the same term as the marshal's acknowledgment. *Cunningham v. Cogun*, T. 48 G. 3. 279
- 18 Where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first day of term, being the return-day of the writ, and the under sheriff signified his assent to the surrender by the return of post the next day, at the distance of 17 miles; held sufficient to discharge the bail-bond of which the plaintiff had taken an assignment afterwards, with notice of such surrender. *Plimpton v. Howell*, T. 48 G. 3. 303
- 19 Where a sham plea was pleaded of judgments recovered in the Court of Picpoudre in *Bartholomew* fair, in terms palpably fictitious and out of the regular course, the Court reprobated the practice, and suffered the plaintiff, to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. *Blewit v. Marsden*, T. 48 G. 3. 363
- 20 After a writ sued out, and common bail filed, against a defendant by the name of J. it is irregular for the plaintiff to declare against him by the name of R., sued by the name of J. (he not having then appeared) and the defendant may set aside the proceedings before plea. *Delaney v. Cannon*, M. 49 G. 3. 405
- 21 After judgment for the defendant on demurrers to certain special pleas there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined. *Paxton v. Popham*, M. 49 G. 3. 422
- 22 A plea of ancient demesne was permitted to be filed de bene esse within the four first days, pending a rule nisi for permission to allow the plea so filed. *Doe dem. Morton v. Roe*, H. 49 G. 3. 494
- PRESCRIPTION.**
See EVIDENCE. 5.
- PRESUMPTION.**
See POSSESSION.
- PRINCE OF WALES.**
See BOND. 4.
- PRINCIPAL AND SURETY.**
See SURETY.
- PRISONER.**
See ESCAPE.
- 1 A prisoner under criminal process in the house of correction cannot be brought up by habeas corpus ad respondendum, for the purpose of being charged with a declaration on a bailable writ, and recommitment to his former custody so charged: for the court have no power to make the gaoler of such prisons liable for the escape of a prisoner under civil process. *Brandon v. Davis*, M. 48 G. 3. 86
- 2 Aliter in the case of a sheriff or gaoler of the court. *ib.*
- PROHIBITION.**
- 1 Prohibition granted on affidavit that the defendant (to a libel for tithes in kind in the spiritual court) answered on oath, or pleaded a modus; without its appearing that the modus was regularly pleaded below, so as to be put in issue there. *French v. Trask*, M. 49 G. 3. 414
- 2 Prohibition denied after sentence, where the party applying had permitted the question of fact, whether the land for which tithes was claimed, were natural meadow or not, to be tried below. *Stainbank v. Bradshaw*, M. 48 G. 3. 414
- PROMISSORY NOTES.**
See BILLS OF EXCHANGE.
- PROMOTIONS.**
- 1 In *Hilary* vacation Mr. Justice Rooke, of C. B. died; and was succeeded by Mr. Justice Lawrence, who resigned his seat on the bench of B. R. And in *Easter* term John Bayley, Esq. serjeant at law, was appointed a judge of this Court, and was knighted. 166
- 2 In *Trinity* term Messrs. Manley, Pell, and Rough, were called serjeants, and took for their motto "Pro rege et lege." 255
- 3 Mr. Serjt. Heywood and Mr. Balguy made *Welsh* Judges. 364
- Mr. Clarke made King's Counsel. *ib.*
- PROTEST.**
See CORPORATION, 1.

QUO WARRANTO.

1 See CORPORATION.

Quære; Whether, if it be found against a defendant in *quo warranto*, that, though duly elected, he was not duly sworn in, there can be any other judgment against him than of *oustér absolute*; there being no instance of a judgment of *oustér quovunque*. *The King v. Courtenay*, H. 48 G. 3. 128

2 The stat. 32 G. 3. c. 58. s. 1., enabling defendants in *quo warranto* to plead double, is, as well as the stat. 9 Ann. c. 20, confined to corporate officers. *The King v. Richardson*, E. 49 G. 3. 228

3 One who has not taken the sacrament within a year being incapable of being elected into a corporate office by stat. 13 Car. 2. c. 12, his disqualification was held not to be removed by the annual act of indemnity (47 G. 3. st. 2. c. 35,) the 6th section of which restrains its operation in cases where the office shall have been "already legally filled up and enjoyed by any other person," at the time of passing the act; the fact being, that the defendant and another were candidates at the time of the election, when 40 electors were assembled; and after 2 electors had voted for each candidate the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidate in the affirmative; whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted for the defendant, being 20 in number, except 2 or 3; and 16 afterwards voted for the other. Held,

1st, That all the votes given for the defendant after such notice were thrown away.

2dly, That the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes (not being equal in number to the good votes ultimately given for the other) had voted before such notice.

3dly, That the presumption of law being that every person has conformed to the law till something appear to rebut that presumption; it must be taken that the other candidate who affirmed his qualification, which was not negatived by the jury, was duly qualified; and that such his election, perfected by swearing-in, was a *filling-up and enjoying* by him of the office, within the proviso of the indemnity act, so as to preclude its operation by relation in favour of the defendant. *The King v. Hawkins*, T. 48 G. 3. 352

4 Freemen of *Norwich*, substitutes in the militia quartered at *Colchester*, but having dwelling houses in *Norwich*, in which their families resided, and to which they at times resorted on furlough (in some instances, within the last six months, only for the purpose of voting at elections,) held to be inhabitants within the charter of *Norwich*,

and a local act, requiring them to have been inhabitants for six calendar months previous to certain elections of corporate officers, in order to qualify them to vote. *The King v. Mitchell*, H. 49 G. 3. 488

RECORD.

See VARIANCE, L

RECTORY.

See MORTMAIN, I.

REGISTER.

See SHIP, 2.

REGISTER of Title.

A lessee of land in the *Bedford Level* cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 Car. 2. c. 17, for want of being registered; such act enacting, that "no lease, &c. should be of force but "from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrances, registering their titles before. *Hodson v. Sharpe*, M. 49 G. 3. 415

RELEASE.

No release from an heir at law to one in possession of copyhold will be presumed during the continuance of a curtesy estate under which such tenant in possession might have defended himself, though claiming in another right. Nor will such release be presumed from the present heir, after the death of the former heir within a short period, when the present heir might be called upon in equity to discover it, if given; though such release, if proved or presumed, would bar the copyholder's claim: *Doe d. Sir W. Milner, Bart. v. Brightwen*, H. 49 G. 3. 521

REMOVAL.

See APPEAL, 2.

RENT DOUBLE.

See LANDLORD AND TENANT, I.

SACRAMENT.

See CORPORATION, 5.

SALE—by Sample.

See MARKET TOLL.

SALEABLE UNDERWOODS.

See POOR'S RATE, 3.

SCIRE FACIAS, WRIT OF.

See AMENDMENT, L.

SET-OFF.

A solvent partner may join with the assignees of his two bankrupt partners in maintaining an action for money had and received to recover back from a creditor the amount of

a bill, (part of the joint stock,) received by him from the acceptor by the indorsement of the two partners after acts of bankruptcy committed by them: and such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs. *Thomason, and Others v. Frere*, H. 49 G. 3. 447

SETTLEMENT.
See CONVEYANCE.

SETTLEMENT—By Apprenticeship.

An indenture binding an adult as an apprentice, which was not executed by herself but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice; and consequently up settlement can be gained by her under such an indenture. *The King v. The Inhabitants of Ripon*, H. 48 G. 3. 150

—By Estate.

A guardian in socage, residing on the ward estate for 40 days, gains a settlement in the parish; and cannot be removed from the possession of it at any time. *The King v. The Inhabitants of Oakley*, H. 49 G. 3. 480

—By Hiring and Service.

1 A deserter from the King's marine service cannot gain a settlement under a hiring and service for a year; not being sui juris, nor competent lawfully to hire himself within the stat. 3 W. and M. c. 11. s. 7. *The King v. The Inhabitants of Norton*, H. 48 G. 3. 110

2 A poor boy sent out of the house of industry at 14 years of age to the parish officers, and by them allotted to a parishioner, who handed him over to another person, by whom the boy was told that he was to stay with them a year, and should have clothes, &c.: to which the boy made no objection; conceiving himself obliged to accept the service: but made no agreement for wages, or concerning the nature or duration of his service, nor was consulted upon the subject; does not gain a settlement by serving under this supposed obligation for a year; for neither did he consider himself, nor was he considered by the other parties, as a free agent; and such only can contract, or adopt a contract made by others. *The King v. The Inhabitants of Slow-Market*, H. 48 G. 3. 112

3 A widower having a daughter, placed her at 11 years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service to him, but without any contract of hiring to give her a settlement of her own; the father in the meantime having gone out to service. Held, that on her coming of age she was emancipated, although her father conceived himself bound, as such, to receive and support her, if she left her uncle's; and conse-

quently the father was capable of gaining a settlement by hiring and service for a year, as "an unmarried man, not having a child," (i. e. not having a child who would follow his settlement) within the stat. 3 W. & M. c. 11. s. 7. *The King v. The Inhabitants of Cowhoneyborne*, T. 48 G. 3. 298

4 No settlement can be gained by serving under a contract of hiring for four years with liberty for the servant to leave for a week every year to see his friends; for that is to be taken distributively, i. e. reserving a week out of each year. *The King v. The Inhabitants of Rushulme*, M. 48 G. 3. 408

5 Under a contract of hiring as a bleacher and crofter for a year at 12s. a-week, the servant continuing to work under such a contract for a year gained a settlement in the parish where he resided, although by the practice of the manufactory in which he was engaged, if he finished his appointed week's work, calculated also many pieces a-day for six days, in less time, he had the rest of the week to do as he pleased, and he also went where he chose on Sundays, without asking leave: for this is an express contract for a year, without any express exception. *The King v. The Inhabitants of Horwick*, H. 49 G. 3. 479

6 A statute fair being held yearly on the day after old Michaelmas, except when old Michaelmas falls on a Saturday, and then the fair being held on the Monday; held that a hiring from such Monday till old Michaelmas day following is not a yearly hiring under which a settlement can be obtained. *The King v. The Inhabitants of Standon Massey*, H. 49 G. 3. 517

—By Marriage.

Evidence that British subjects in a foreign country, being desirous of intermarrying; went to a chapel for that purpose where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating clerk: which service the parties understood to be the marriage service of the church of England: and they received a certificate of the marriage, which was afterwards lost: is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years cohabitation as man and wife, till the period of the husband's death. And such British subjects being attached at the time to the British army on service in such foreign country, and having military possession of the place; it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of England, as a marriage contract per verba de presenti before the marriage act; marriages beyond sea being excepted

out of that act; and it would make no difference if solemnized by a Roman catholic priest. *The King v. The Inhabitants of Brampton*, M. 49 G. 8. 884

—By Rating.

- 1 Payment by one who was assessed to a church rate upon householders only, and not upon the parishioners at large, will nevertheless gain him a settlement; for it is not less a public tax because laid too narrowly; and it is charged and paid within the parish, which is all that is required by the stat. 3 W. 3. c. 11. s. 6. *The King v. The Inhabitants of St. Bees*, H 49 G. 3. 109
- 2 Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not in his own, but in his son's name, for the purpose of making such parishioner a witness is nevertheless incompetent to prove the settlement in the other parish. *The King v. The Inhabitants of Killerby*, M. 49 G. 2. 838

—By taking a Tenement of 10l. a-year.

- 1 A tenement found to be of the value of 4s. a week, and to be demisable at all times of the year, if let by the week; but not to be of the value of 10l. a year, to be let by the year; cannot confer a settlement on the occupier by residence thereon for 40 days. *The King v. The Inhabitants of Hellingly*, T. 48 G. 3. 277
- 2 Renting the hire or privilege of milking two cows, belonging to another at so much per week, per cow, for 40 weeks: which cows were to be depastured by the owner on his farm in common with his other cattle, and were to be milked by the pauper; will gain him a settlement, if the pasturage of the two cows be worth 10l. a year. *The King v. The Inhabitants of Stoke-upon-Trent*, H. 49 G. 3. 482

SEXTON.

See MANOR, 1.

SEWERS.

The stat. 23 H. 8. c. 5. s. 17, having directed that "laws, acts, decrees and ordinances" made by commissioners of sewers shall stand good and be put in execution so long time as their commission endureth, and no longer, except "the said laws and ordinances" be engrossed in parchment, and certified under the seals of the commissioners into Chancery, and have the royal assent: and the stat. 13 Eliz. c. 9. having directed all commissioners of sewers to continue in force for 10 years, unless sooner determined by supersedeas or any new commission; and that "all laws, ordinances, and constitutions," made by force of such commission, being written in parchment, indented and under seals, &c. shall, without such certificate or royal assent, continue in force notwithstanding the determination of the commission by supersedeas, until repealed or altered by

new commissioners; and that all such laws, ordinances, and constitutions, written in parchment, indented, and sealed, &c. shall, without certificate or royal assent, continue in force for one year after the expiration of such commission by lapse of 10 years from its teste: held,

1 That the laws, acts, decrees, and ordinances, mentioned in the stat. of Hen. 8. mean the same as the laws, ordinances, and constitutions, mentioned in that of Elizabeth. And,

2 That a decree made by commissioners under a former commission which had expired by lapse of 10 years, directing a seawall to be refunded, which had been destroyed by a violent tempest and inundation, and the sums necessary for its construction to be advanced by those who were before bound to sustain it ratione tenuræ, (and who did advance the money accordingly) and that a rate should be made on the level for their reimbursement; (although such decree had been written in parchment, indented, and sealed; which this was not,) could not be enforced by commissioners under a new commission, issued more than a year after the expiration of the former commission; as to so much of it as remained unexecuted: though good to the extent to which it had been executed: and therefore this court refused a mandamus to the new commissioners to direct a rate to be levied on the level for the reimbursement directed by the decree. *The King v. The Commissioners of Sewers, Somerset*, M. 48 G. 3. 66

SHERIFF.

- 1 In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods under a writ of fieri facias, by which they were sold much under value, where in stating the substance of the writ, the court alleged that the sheriff was commanded to levy 80s. awarded to J. C. for his damages sustained by occasion of the detaining the debt; that is proved by the writ which stated that the 80s. were awarded to J. C. for his damages sustained as well by reason of detaining the debt as for his costs, &c.; for costs are in legal sense included in the word damages. *Philips v. Bacon*, H. 48 G. 3. 152

- 2 A sheriff justifying in trespass, under a writ of fieri facias, need not shew its return; the distinction being in this respect between a justification under mesne process, and under process in execution; at least where in the latter case no ulterior process is necessary to complete the justification. *Chensley v. Barons*, T. 48 G. 3. 291

SHIP.

- 1 The master of a ship has no lien on it for money expended or debts incurred by him

- for repairs done to it on the voyage. *Hussey v. Christie*, E. 48 G. 8. 210
- 2 The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be sea-worthy, or repairable so as to carry the cargo to its place of destination but at an expence exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to sell the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised bona fide in a case of necessity; still the vessel subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repair on the spot, can only be conveyed by the captain in the form prescribed by the register acts; and the requisites of those acts not having been complied with, the sale in question was held to transfer no property to the vendee. *Reid v. Darby*, T. 48 G. 8. 322
- 3 A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage: and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. *Splidt v. Bowles*, M. 49 G. 3. 383
- 4 Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of the homeward bound-cargo, from Honduras Bay to London, and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's into which they were carried by the recaptors, a sale of the cargo was directed by the Vice Admiralty Court there, on the application of the master, acting bona fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners: held that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight pro rata itinaria. For such form of action for the proceeds of an illegal sale of goods, is only a waiver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt; which admits of a set off, &c.) but does not recognize the right of the vendor so to convert the goods. And here the act of conversion, (for such it must be taken to be being made by the master, (who is the general agent of the ship owners,) and not, as in *Baillie v. Modigliani*, by the act of a Court of com-

petent jurisdiction; was unlawful, and discharged the claim of the ship owners for freight pro rata itinaria. *Hunter v. Priasep*, M. 49 G. 8. 428

5 But the plaintiff could not recover against the ship owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves. *Hunter v. Priasep*, M. 49 G. 8. 428

SLANDER.

- 1 The rule of construction as to slanderous words is to construe them in their plain and proper sense, such in which an ordinary hearer would have understood them at the time they were spoken. And therefore the defendant saying of the plaintiff that "he was under a charge of a prosecution for perjury; and that G. W. (an attorney of that name) had the Attorney-General's directions to prosecute the plaintiff for perjury," is actionable. For after verdict (by which the jury, who are to judge of the intent of the speaker, must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had not committed,) the words, not having been justified, must be taken to be false; and being unqualified by any context, and unexplained by any occasion to warrant them, the law infers malice from the falsehood of an accusation which, in the common acceptance of the words, impute perjury to the plaintiff. *Roberts v. Camden*, M. 48 G. 8. 59
- 2 Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to support it, is not necessary to sustain the action, it may be rejected as surplusage. And therefore an innuendo, that the Attorney-General spoken of meant the Attorney-General for the county Palatine of Chester, was so rejected. *ib.*

SOLDIER.

See SETTLEMENT BY HIRING AND SERVICE, 1.

SPECIAL JURY.

See PRACTICE, 14.

STAGE COACHES.

See TURNPIKE, 1.

STAKE HOLDER,

- 1 Where money in litigation between two parties has by mutual consent been paid over to a trustee, in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party

who was indebted; though he agreed to waive all objections to form. *Ker v. Osborne*, E. 48 G. 3. 188

STAMPS.

- 1 *A.* and *B.* having exchanged their acceptances of bills drawn by each on the other at so many day's date; held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not after they had been so exchanged for valuable consideration (as the exchange of acceptances is) for 20 days, be postdated without a new stamp as upon new bills; although during all that time each had remained in the hands of the original drawer. *Cardwell v. Martin*, H. 45 G. 3. 102
- 2 A policy of insurance originally underwritten on "ship and outfit" was after the ship sailed declared by consent of all parties, to be on "ship and goods," by a memorandum written on a blank space in the body of the policy; but without any new stamps; and it having been before decided that for want of the stamp the plaintiff could not recover as upon a policy on ship and goods, as declared by the memorandum, it was now held that he could not recover upon the policy in its original state, as an insurance on "ship and outfit," by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested. *French v. Fallon*, E. 45 G. 3. 176
- 3 A promissory note for 100*l.* payable to the plaintiff, or order, and originally expressed to be for value received, generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the words for the good-will of the lease and trade of *Mr. K.* deceased, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill v. Williams*, H. 49 G. 3. 493

STATUTES.

- 1 A statute introductive of a new qualification as to the subject matter, though penned in the affirmative, repeals a former statute concerning the same matter. Therefore the stat. 13 G. 2. c. 28. s. 6, exempting from the impress service any harpooner, &c. seaman, &c. in the *Greenland* trade, is impliedly repealed by st. 26 G. 3. c. 41. s. 17, which exempts such harpooner, &c. whose name shall be inserted in a list required to be delivered on oath by the owner of the vessel to the collector of the customs; and which also exempts any seaman entered on board any ship intended to proceed on the said fishery in the following season, whose name shall be inserted in a list to be delivered as aforesaid, and who shall have given security, &c. to proceed, and shall proceed accordingly: for the lat-

ter statute superadds the insertion of the seaman's name in such list as a condition precedent to the exemption. *Ex parte Caruthers*, M. 48 G. 3. 37

- 2 The stat. 42 G. 3. c. 33, forbids corn making into malt to be wetted, while it is a-floor before 12 days from the time when it is emptied out of the cistern. The stat. 46 G. 3. c. 139. s. 1, repeals that provision generally, and enacts (s. 3.) that the corn in that state shall not be wetted till 9 days, &c. after the 1st of August 1806. Then s. 14, enacts, that this act shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st of August 1806, and shall continue in force till the 25th of March 1807. Held that incorporating the 14th with the 1st section, this law only operated as a repeal of the former one during the time limited in the 14th section; after which the first resumed its operation during the interval between the 25th of March 1807, and a subsequent reviving and continuing the 46 G. 3. *The King v. Rogers*, H. 49 G. 3. 514

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STOCK TRANSFERABLE SCHEMES.
See INDICTMENT, 2.

SUBPŒNA DUCES TECUM.

The writ of subpoena duces tecum is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness is to judge. And in an action against a sheriff's bailiff for disobeying such writ, who having been subpoenaed, on a former action by the plaintiff against another to produce the warrant under which he acted, had neglected so to do, whereby the plaintiff was wronged; his ability to produce the warrant and his want of just excuse for not producing it are sufficiently alleged by stating that he could and might in obedience to the said writ of subpoena have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary. *Amey v. Long, E. 48 G. 3.* 280

SURETY.

- 1 The laches of obligees in a bond, (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees) in not properly examining his accounts for 8 or 9 years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel at law in an action against the sureties. *The Trent Navigation Company v. Harley, T. 48 G. 3.* 274.
- 2 The Prince of Wales having granted an annuity for his own life, payable by the treasurer of his privy purse; which annuity was assigned by the grantee to another, with the Prince's assent; and a surety having given bond to the assignee of the annuity, conditioned to pay it, if the Prince, or the treasurer of his privy purse, or any other person for the Prince, did not pay it at the respective quarter days; held that the surety was bound at all events at law by the terms of the obligation to pay it, if the Prince, &c. did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the Prince's treasurer, as required in all cases within the stat. 35 G. 3. c. 125. s. 7. on pain of being foreclosed of such demand; whatever equitable claim might be founded by the surety on such neglect. *O'Kelly v. Sparkes, M. 49 G. 3.* 424

SURPLUSAGE.

See PLEADING. 13.
Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to support it, is not

necessary to sustain an action for slander, it may be rejected as surplage. And therefore an innuendo that the *Attorney-General* spoken of meant the *Attorney-General* for the county palatine of *Chester*, was so rejected. *Roberts v. Camden*, *M.* 48 G. 3. 59

SURRENDER.

John Lealand surrendered a copyhold in the occupation of him, *John Lealand*, to the use of *Joseph Lealand* and *John Lealand his son*, for their lives and the life of the survivor; remainder to the heirs of the body of the said *John Lealand son of Joseph L.*; remainder to the right heirs of the said *John Lealand*: held, that the ultimate remainder was meant for the right heirs of *John the surrenderor*; as well because *John the surrenderer* is before described with the addition of the son of *Joseph*; as of the manifest futility of giving *John the surrenderer* an estate tail, and afterwards a fee in succession. Though if the construction had even been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe d. Hucknall v. Foster*, *E.* 43 G. 3. 200

TENANT.

See LANDLORD AND TENANT.

TENDER.

See PLEADING, 18.

To make a legal tender, there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. Therefore where the defendant, on departing from home, left 10*l.* with his clerk for the plaintiff: of which the clerk informed the plaintiff when he called, and demanded a larger sum: and the plaintiff said he would not receive the 10*l.* nor any thing less than his whole demand; but the clerk did not offer the 10*l.*; this was held to be no tender. *Thomas v. Evans*, *T.* 48 G. 3. 303

TIMBER.

See COPYHOLDER, 3.

Beech being admitted to be timber by the custom of the county of *Bucks*, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at 20 years growth; and therefore upon an issue, whether certain beech trees in that county, (which after being felled had been distrained for payment of a poor's rate, to which it was contended that they were liable,) were or were not timber, according to the custom of the county, the inquiry is confined to the nature of the wood, and the period of its growth, whether of 20 years, and no evidence can be received to qualify its character of timber, by shewing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood.

And the jury having found a general verdict for the plaintiff on that issue affirming such trees of 20 years growth and upwards, though not containing ten feet of solid wood, to be timber by the custom; and also upon another issue, negating them to be saleable underwood within the stat. 43 Eliz. c. 2.; the Court refused to grant a new trial. *Aubrey v. Fisher*, *H.* 49 G. 3. 460

TITHE.

- 1 At common law grass is tithable in grass cocks, after having been teded in the course of the process of making it into hay. *Newman v. Morgan*, *T.* 48 G. 3. 261
- 2 The tithe of turnips drawn to feed cattle held to be properly set out by being thrown aside, as drawn, on a ridge opposite for the parson, without being set out in heaps for him; the farmer not putting the nine parts into heaps for himself. *Blaney v. Whitaker*, *M.* 28 G. 3. *B. R.* cited. *ib.* 263
- 3 Compositions for tithes cease on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payment due after the death of his predecessor, he can only be accountable to the executors for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to, and not pro rata, according to the time which had run before his death from the last payment. *Williams v. Powell, Clerk*, *M.* 49 G. 3. 269. 375

TOIL.

See MARKET-TOLL. TURNPIKE.

TRADE.

See IMPRESS, 1.

INSURANCE, 3.

INDICTMENT, 2.

The stat. 43 G. 3. c. 153. s. 15. having enabled the king by order in council to license the importation of certain goods, being *British* or neutral property, from the enemy's country, in neutral ships; a contract made by *A.* and *B.* *British* subjects, (the plaintiffs) for the purchase of brandy from a house of trade in *France* (an enemy,) to be shipped from thence in a neutral, on account of *A.* and *B.*; which contract was made in contemplation of obtaining a licence for that purpose; which licence was accordingly obtained soon after the making of such contract, and before it was begun to be executed; is a legal contract, and may lawfully be guaranteed in the first instance by *C.* and *D.* other *British* subjects (the defendants). And after such licence obtained, the guaranties are liable in damages for the non-shipment of the goods by the house in *France* on board a neutral sent there for that purpose. Though it were objected to the licence legalizing such trade, that it was not made out to *A.* and *B.* by name, but only to *C.* and *D.* and oth-

er British merchants; and that neither *C. D.*, nor even *A.* and *B.*, had any property in the goods; whereas the licence required the goods to be imported to be *the property of the said persons or some of them*; and, until shipment, the property continued in the house in France. For neither the act of parliament, nor the king's licence, required the owners of the property to be *individually named*; and even if the licence were to be so construed, as it only required the goods imported to be the property of "the said persons or some of them, *as may be specified in their bills of lading*;" and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if so, would have conveyed to them a legal or special property in the goods; the defendants *C.* and *D.* were still liable to answer in damages, upon their guaranty, as for the non-performance of a legal contract. *Timson v. Merac*, M. 48 G. 3. 33

TRESPASS.

See *COPYHOLD*, 1. PLEADING, 2, 7, 9, 11.

One magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 G. 3. c. 44., though by the statute 18 Eliz. c. 3. s. 2. jurisdiction over the subject matter is given to two magistrates. *Weller v. Toke*, E. 48 G. 3. 132.

TURNPIKE.

1 A turnpike act imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or repassing with the same carriage or horse, exempts the traveller from paying a second time in the day for the passage of the *same carriage*, though drawn by *different horses*, being the same in number. And another clause providing that in all cases of *carriages travelling for hire*, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages repassing with a different traveller or passenger, does not extend to *stage coaches*, the *carriage itself* not being there *hired* by the respective passengers, but only a conveyance by it; and therefore such stage coaches are freed of toll under the former clause by one payment in the day, although returning with different passengers and different horses being the same in number. *Williams v. Sanger*, T. 48 G. 3. 263

2 A collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate: no objection being

made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent *5l.* inclosed in a letter to the plaintiff, in which he stated that she should have the *remainder* next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls. *Peacock v. Harris*, T. 48 G. 3. 305

VALUE OF PREMISES UNDER COMPENSATION ACT.

See *WEST-INDIA DOCKS*.

VARIANCE.

See *DAMAGES AND COSTS*.

1 In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought: and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the description of such record of acquittal. *Purcell v. Macnamara*, M. 48 G. 3. 180

2 A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Celler-beer* field, instead of the *Aller-beer* field, being considered as part of the description of the deed declared on; though the plaintiff waived going for damages on the breach of that covenant; is fatal. *Pill v. Green* H. 48 G. 3. 101

3 Proof that the defendant agreed to sell his horse warranted sound to the plaintiff for 31*l.* 10*s.*, and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.* the defendant promised that it was sound; and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the said 31*l.* 10*s.* *Hands v. Burton*, E. 48 G. 3. 175

VENUE.

See *PLEADING*, 20.

The venue may be changed in an action for criminal conversation on the usual affidavit, that the whole cause of action, if any, arose in the county to which it is changed; for the whole cause of action is the trespass on the plaintiff's wife, and the venue can only be brought back by the plaintiff's undertaking to give material evidence in the original county. *Guard v. Hodge*, T. 48 G. 3. 272

VOLUNTARY CONVEYANCE.
See CONVEYANCE VOLUNTARY.

VOTING.
See CORPORATION, 5, &c.

WAGER.
See ASSUMPSIT, 6.

WASTE.
See COPYHOLD, 3.

WEST INDIA DOCKS.

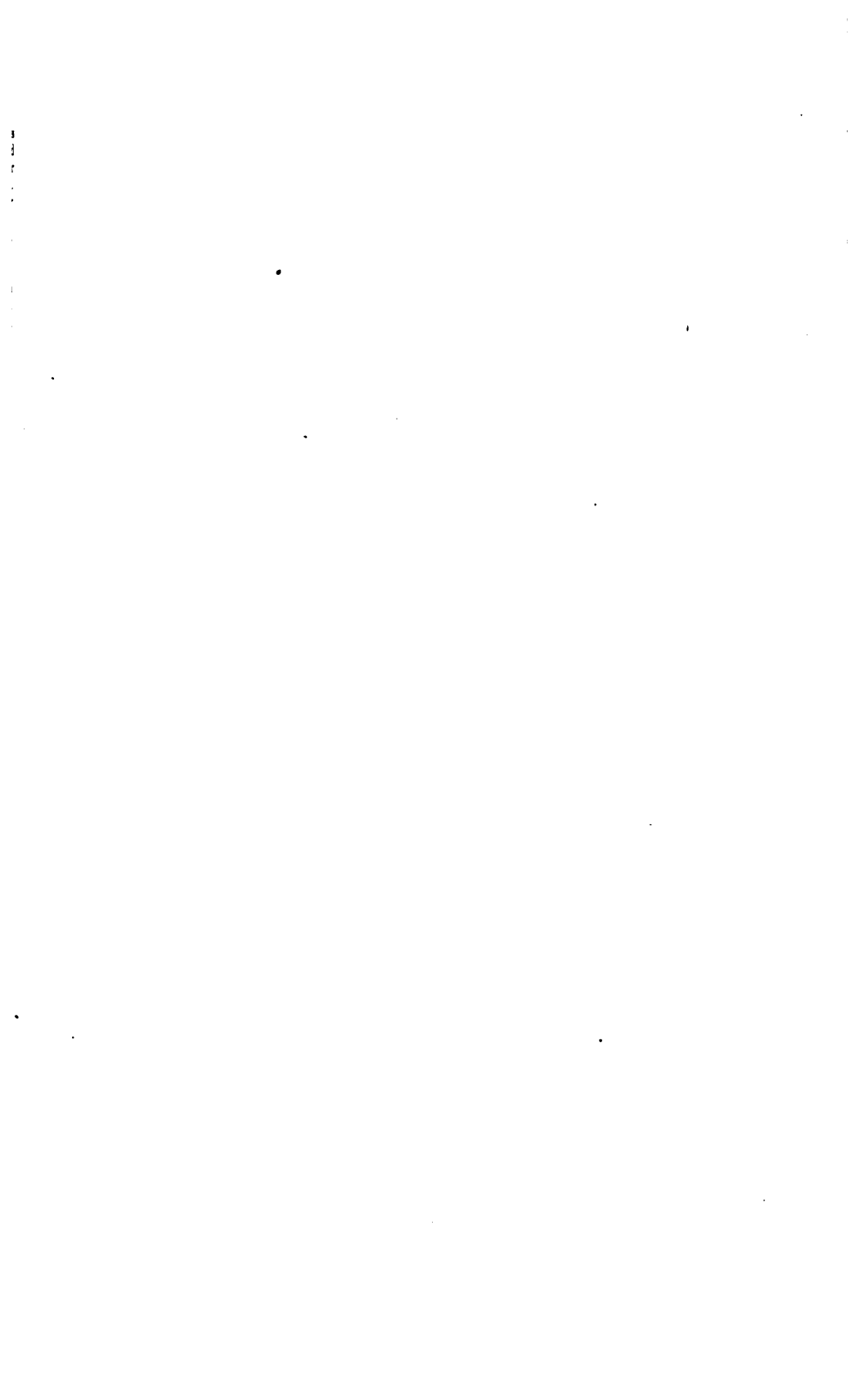
The compensation clause, s. 121 of the stat. 39 G. 3 c. 69 directing that in case any warehouses, &c. (used for holding *West India* produce before that act) should be rendered *less valuable* by reason of the *West India* trade being diverted therefrom by the then intended *West India* docks and works, than they were *before the passing of the act*; or in case the *yearly* or *other* receipts of *Christ's* hospital should be thereby lessened; the owners of such warehouses, &c. and the governors of the hospital should be compensated: (thereby putting such owners, and governors on the same footing) must be construed with reference to the *yearly* profits made of the premises *antecedent* to the passing of the act; and the *value* of such warehouses

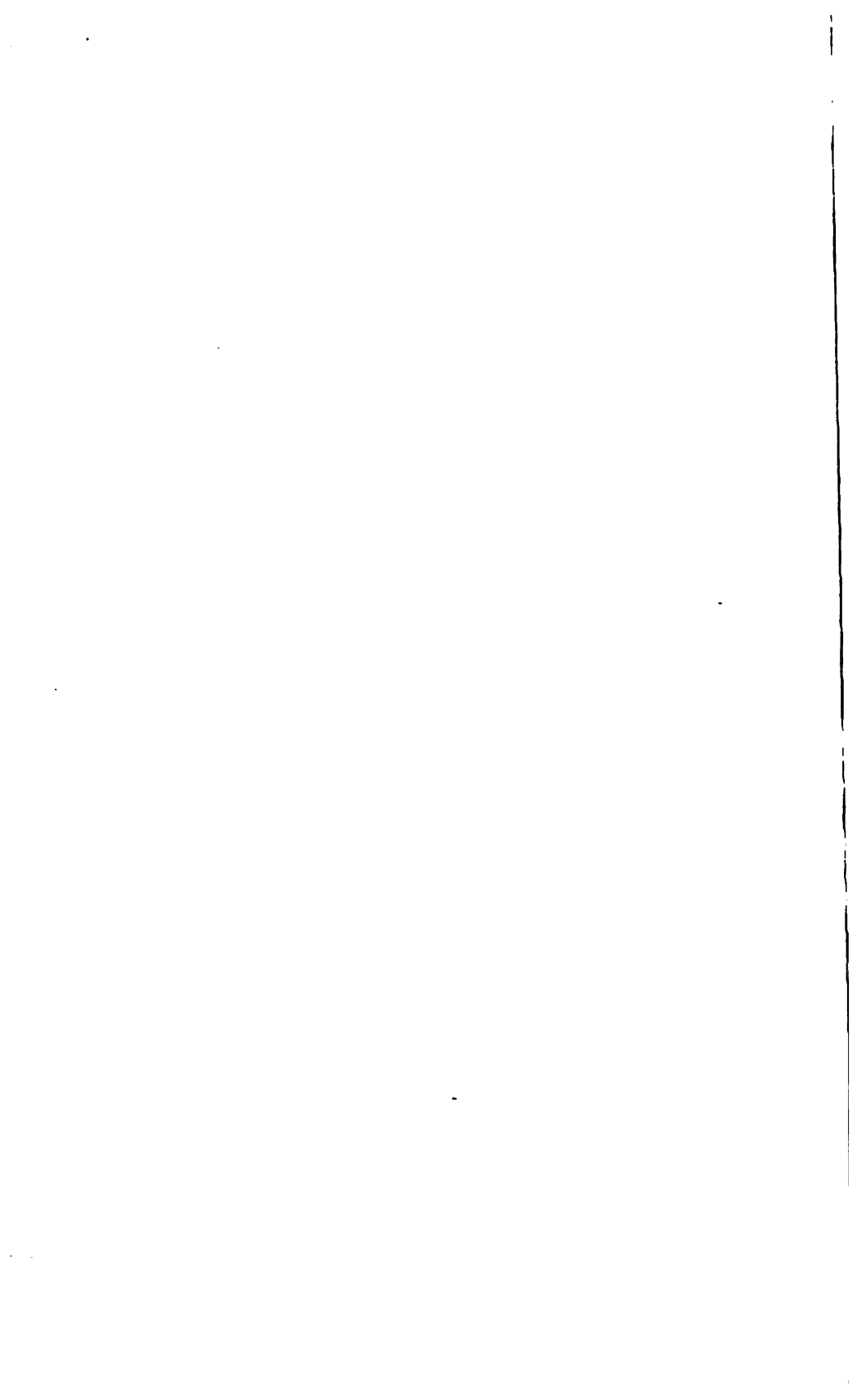
cannot be evinced by the *yearly* profits made between the passing of the act and the opening of the docks, by which latter the loss was occasioned. *Manning v. Commissioners of Compensation under the West India Dock act.* M. 49 G. 3.

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WITNESS.

- 1 Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not in his own, but in his son's name, for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish. *The King v. The Inhabitants of Kullerby,* M. 49 G. 3. 388
- 2 A rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another, touching the settlement of a pauper; although the nominal parties be the churchwardens and overseers of the poor of the respective parishes; and being, as such party, directly interested in the event of that proceeding; he cannot be compelled to give evidence by the adverse parish even since the stat. 46 G. 3. c. 37., not being within the words or meaning of that law. *The King v. The Inhabitants of Woburn,* M. 49 G. 3. 436





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